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## Humanity for Asylum Seekers: How Migrant Protection Protocols and the March 20th CDC Order violate the Constitutional rights of Asylum Seekers During the COVID-19 Pandemic

Madison Beck

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**Humanity for Asylum Seekers: How Migrant Protection Protocols and the  
March 20th CDC Order violate the Constitutional rights of Asylum Seekers  
During the COVID-19 Pandemic**

By: Madison Beck

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## Introduction

On December 20, 2018, the Secretary of Homeland Security, Kirstjen M. Nielsen, introduced Migrant Protection Protocols that require certain persons seeking asylum in the United States to return to Mexico while U.S. Citizenship and Immigration Services (USCIS) processes their claims.<sup>1</sup> According to Nielsen, the protocols are intended to prevent “aliens [from] trying to game the system to get into our country illegally and [being] able to disappear into the United States, where many skip their court dates.”<sup>2</sup> Multiple lawsuits have been filed addressing this issue, the most prominent being *Innovation Law Lab v. Nielsen* where eleven “Returned” individuals and six non-profit organizations allege violations of the Immigration and Nationality Act (INA) and the Administrative Procedure Act.<sup>3</sup> Additionally, the Centers for Disease Control and Prevention (CDC) issued an “order suspending introduction of certain persons from countries where a communicable disease exists”, arguing that immigrants pose a threat to U.S.

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<sup>1</sup> Kirstjen M. Nielsen, *Policy Guidance for Implementation of the Migrant Protection Protocols*, HOMELAND SECURITY, (Jan. 25, 2019), [https://www.dhs.gov/sites/default/files/publications/19\\_0129\\_OPA\\_migrant-protection-protocols-policy-guidance.pdf](https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf).

<sup>2</sup> Homeland Security, *Secretary Kirstjen M. Nielsen Announces Historic Action to Confront Illegal Immigration*, (Dec. 20, 2018), <https://www.dhs.gov/news/2018/12/20/secretary-nielsen-announces-historic-action-confront-illegal-immigration>.

<sup>3</sup> Ashoka Mukpo, *Asylum Seekers Stranded In Mexico Face Homelessness, Kidnapping, and Sexual Violence*, ACLU, (2020), <https://www.aclu.org/issues/immigrants-rights/immigrants-rights-and-detention/asylum-seekers-stranded-mexico-face>, *Innovation Law Lab v. Nielsen*, 342 F. Supp. 3d 1067, 2018 U.S. Dist. LEXIS 127870, 2018 WL 3631886, [https://plus.lexis.com/search/?pdmfid=1530671&crd=ff8ebcb0-e77d-47e0-b387-db828323d5ce&pdsearchterms=Innovation+Law+Lab+v.+Nielsen%2C+342+F.+Supp.+3d+1067&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqtype=and&pdquerytemplateid=&comp=8g\\_tk&earg=pdsf&prid=0546b6a6-90a2-491e-8f09-ffbb9cd7b3f3](https://plus.lexis.com/search/?pdmfid=1530671&crd=ff8ebcb0-e77d-47e0-b387-db828323d5ce&pdsearchterms=Innovation+Law+Lab+v.+Nielsen%2C+342+F.+Supp.+3d+1067&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqtype=and&pdquerytemplateid=&comp=8g_tk&earg=pdsf&prid=0546b6a6-90a2-491e-8f09-ffbb9cd7b3f3).

citizens during the COVID-19 pandemic.<sup>4</sup> Within just six weeks of the issuance of this order, the Department of Homeland Security (DHS) prevented thousands of asylum seekers from proceeding with their claims and removed them to Mexico.<sup>5</sup>

This removal is inhumane. Asylees who have been returned to Mexico face the typical risk of danger from violent groups of individuals in Mexico, in addition to the risk of contracting COVID-19 in asylum camps and migrant shelters where safety from infection and potential death are not guaranteed.<sup>6</sup> Instead of aiding asylum seekers, the U.S. continues to reduce protection for asylum seekers during a time where protection is needed most. Asylum procedure requires applicants be in the U.S. at a port of entry, indicating that asylum seekers are persons in the U.S. under the Fifth and Fourteenth amendments to the U.S. Constitution.<sup>7</sup> Therefore, the Migrant Protection Protocols and the CDC order violate the constitutional rights of asylum seekers when they fail to protect asylees from deprivation of life and liberty without due process of law. The Migrant Protection Protocols and the

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<sup>4</sup> 42 C.F.R. §71 (2020), <https://www.federalregister.gov/documents/2020/03/24/2020-06238/control-of-communicable-diseases-foreign-quarantine-suspension-of-introduction-of-persons-into>.

<sup>5</sup> Human Rights First, *Indefinite Suspension of Protections for Asylum Seekers and Unaccompanied Children Under May 19, 2020 Order by the Centers for Disease Control and Prevention*, (May 27, 2020), <https://www.humanrightsfirst.org/resource/indefinite-suspension-protections-asylum-seekers-and-unaccompanied-children-under-may-19>.

<sup>6</sup> Zachary Mueller, *Immigration 101: What is 'Remain in Mexico', or the Migrant Protection Protocols (MPP)?*, America's Voice, (Feb 28, 2019), <https://americasvoice.org/blog/remain-in-mexico-mpp/>, HUMAN RIGHTS WATCH, *U.S. COVID-19 Policies Risk Asylum Seekers' Lives*, (April 2, 2020), <https://www.hrw.org/news/2020/04/02/us-covid-19-policies-risk-asylum-seekers-lives>.

<sup>7</sup> U.S. Citizenship and Immigration Services, *The Affirmative Asylum Process*, DEPARTMENT OF HOMELAND SECURITY, (April 19, 2019), <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/the-affirmative-asylum-process>.

CDC order should be rescinded, and the Migrant Protection Protocols rewritten to effectively protect asylum seekers from the deprivation of rights and humanity they face during the COVID-19 pandemic.

## **Background**

On December 31, 2019 the Chinese government confirmed that cases were on the rise of an unknown pneumonia type illness that was ultimately identified as COVID-19, a disease caused by the SARS-COV-2 virus.<sup>8</sup> Globally, COVID-19 has infected approximately 20.6 million people and caused approximately 749,421 deaths.<sup>9</sup> The U.S. alone is responsible for approximately 5.2 million cases and approximately 167,133 deaths and shares its southern border with Mexico, which is responsible for approximately 505,751 cases and approximately 55,293 deaths.<sup>10</sup> While testing has become widely available in the U.S., Mexico is still limited in their ability to provide COVID testing to citizens, indicating that the actual number

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<sup>8</sup> Robin Muccari, Denise Chow, and Joe Murphy, *Coronavirus timeline: Tracking the critical moments of COVID-19*, NBC NEWS, (March 10, 2020) <https://www.nbcnews.com/health/health-news/coronavirus-timeline-tracking-critical-moments-covid-19-n1154341>, World Health Organization, *Transmission of SARS-CoV-2: implications for infection prevention precautions*, (July 9, 2020), <https://www.who.int/news-room/commentaries/detail/transmission-of-sars-cov-2-implications-for-infection-prevention-precautions>.

<sup>9</sup> Google News, *Coronavirus (COVID-19)*, (last visited Aug. 13, 2020), <https://news.google.com/covid19/map?hl=en-US&mid=/m/09c7w0&gl=US&ceid=US:en>.

<sup>10</sup> Google News, *Coronavirus Disease; Statistics*, (last visited Aug. 13, 2020), <https://www.google.com/search?q=covid19+global&oq=covid19+global&aqs=chrome.0.69i59.2359j0j4&sourceid=chrome&ie=UTF-8>.

of deaths and cases is underreported.<sup>11</sup> The U.S. is the leading country in positive case count, with Mexico coming in sixth.<sup>12</sup>

At the beginning of 2020, leaders in the U.S. and Mexico denied and encouraged citizens to ignore the potential dangers of COVID-19.<sup>13</sup> President Trump declared a national emergency on March 13, 2020 and Mexican President Andrés Manuel López Obrador (AMLO) declared a national emergency on March 30, 2020.<sup>14</sup> While other countries mandated national lockdowns, curfews, and suspensions of air travel, the U.S. and Mexico had less immediate responses.<sup>15</sup> In Mexico specifically, President AMLO refrained from imposing social distancing mandates until March 24, 2020.<sup>16</sup> During an in-person press conference, the president announced a temporary halt in large gatherings and urged citizens to

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<sup>11</sup> Centers for Disease Control and Prevention, *Testing Data in the U.S.*, (Aug. 7, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/testing-in-us.html>, Dave Graham and Diego Oré, *Mexico's coronavirus death surge puts testing regime under the microscope*, REUTERS, (June 16, 2020), <https://www.reuters.com/article/us-health-coronavirus-mexico-tests/mexicos-coronavirus-death-surge-puts-testing-regime-under-the-microscope-idUSKBN23N392>.

<sup>12</sup> Google News, *Coronavirus Disease; Worldwide*, (last visited Aug. 13, 2020), <https://news.google.com/covid19/map?hl=en-US&gl=US&ceid=US%3Aen>.

<sup>13</sup> Kathryn Watson, *A timeline of what Trump has said on coronavirus*, CBS NEWS, (April 3, 2020), <https://www.cbsnews.com/news/timeline-president-donald-trump-changing-statements-on-coronavirus/>, Julia Love, *Mexican government officials send mixed virus social distancing signals*, REUTERS, (March 24, 2020), <https://www.reuters.com/article/us-health-coronavirus-mexico/mexican-government-officials-send-mixed-virus-social-distancing-signals-idUSKBN21B25M>.

<sup>14</sup> Ryan Goodman and Danielle Schulkin, *Timeline of the Coronavirus Pandemic and U.S. Response*, JUST SECURITY, (May 7, 2020), <https://www.justsecurity.org/69650/timeline-of-the-coronavirus-pandemic-and-u-s-response/>, Stefanie Eschenbacher, Diego Ore, and Abraham Gonzalez, *Mexico declares health emergency as coronavirus death toll rises*, REUTERS, (March 30, 2020), <https://www.reuters.com/article/us-health-coronavirus-mexico/mexico-declares-health-emergency-as-coronavirus-death-toll-rises-idUSKBN21I05K>.

<sup>15</sup> Carin Zissis, *Will AMLO's Popularity in Mexico Survive COVID-19?*, WORLD POLITICS REVIEW, (May 13, 2020), <https://www.worldpoliticsreview.com/articles/28757/for-mexico-s-amlo-popularity-hinges-on-covid-19-response>.

<sup>16</sup> Julia Love, *Mexican government officials send mixed virus social distancing signals*, REUTERS, (March 24, 2020), <https://www.reuters.com/article/us-health-coronavirus-mexico/mexican-government-officials-send-mixed-virus-social-distancing-signals-idUSKBN21B25M>.

avoid all gatherings.<sup>17</sup> The deputy health minister additionally encouraged citizens to maintain five feet of distance from one another.<sup>18</sup> These restrictions in Mexico were not met with sanctions, and despite the imposition of fines in some U.S. cities, the number of cases continues to increase daily.<sup>19</sup> Like the U.S., many Mexican states mandated mask-wearing in mid-April, including the border states Tamaulipas, Coahuila, Chihuahua, Nuevo Leon, and Sonora.<sup>20</sup> As of July 18, 2020 Baja California had not yet mandated mask-wearing, although public health organizations continued to encourage the widespread use of masks to prevent the spread of COVID-19 throughout Mexico.<sup>21</sup>

Although both the Mexican and American governments appear to function adequately, the responses to COVID-19 in both countries have been sub-par. According to NPR, other countries around the world who quickly imposed response plans with mandatory quarantines, laws limiting travel, and stay at home

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> Carin Zissis, *Will AMLO's Popularity in Mexico Survive COVID-19?*, WORLD POLITICS REVIEW, (May 13, 2020), <https://www.worldpoliticsreview.com/articles/28757/for-mexico-s-amlo-popularity-hinges-on-covid-19-response>, Betsy Pearl, Lea Hunter, Kenny Lo, and Ed Chung, *The Enforcement of COVID-19 Stay-at-Home Orders*, (Center for American Progress), (April 2, 2020), <https://www.americanprogress.org/issues/criminal-justice/news/2020/04/02/482558/enforcement-covid-19-stay-home-orders/>.

<sup>20</sup> Uno TV Correspondents, *En estos estados ya es obligatorio usar cubrebocas por COVID-19*, UNO TV, (April 20, 2020), <https://www.unotv.com/noticias/portal/nacional/detalle/coronavirus-en-mexico-en-estos-estados-es-obligatorio-usar-cubrebocas-por-covid-19-073279/>, Infobae, *La CDMX implementó el uso obligatorio de cubrebocas por coronavirus*, (April 26, 2020), <https://www.infobae.com/america/mexico/2020/04/26/la-cdmx-implemento-el-uso-obligatorio-de-cubrebocas-por-coronavirus/>.

<sup>21</sup> Mexico News Daily, *Wearing a face mask is mandatory in 24 states; over 7,000 new cases Friday*, (July 18, 2020), <https://mexiconewsdaily.com/news/coronavirus/wearing-a-face-mask-is-mandatory-in-24-states/>.

orders have significantly reduced their numbers of cases and deaths.<sup>22</sup> In the U.S., a majority of citizens disapprove of the Trump Administration's response to the coronavirus.<sup>23</sup> The handling of COVID-19 was left up to local governments.<sup>24</sup> Due to Trump's apparent disregard for the dangers of the virus, Americans from all states simply refuse to follow stay at home orders and mask mandates implemented by states or counties, which has likely contributed to continued increases in cases and deaths.<sup>25</sup> In Mexico, however, the fault lies with President AMLO as well as the functionality of Mexico and its culture.<sup>26</sup> President AMLO has yet to enforce any nationwide mask mandates and refuses to wear one himself, leading many Mexicans to question the health minister's calls to routinely wear masks.<sup>27</sup> Additionally, Mexico spans 758,449 square miles and is home to a population of 126.2 million people.<sup>28</sup> In comparison, the U.S. spans close to 4,000,000 square

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<sup>22</sup> Jason Beaubien, *Some Countries Have Brought New Cases Down To Nearly Zero. How Did They Do It?*, NPR, (May 27, 2020), <https://www.npr.org/sections/goatsandsoda/2020/05/23/861577367/messaging-from-leaders-who-have-tamed-their-countrys-coronavirus-outbreaks>.

<sup>23</sup> Morgan Gstalter, *Trump approval on handling of coronavirus hits new low: poll*, THE HILL, (June 24, 2020), <https://thehill.com/homenews/administration/504254-trump-approval-rating-on-coronavirus-response-at-new-low-poll>.

<sup>24</sup> Gabby Orr, Jeremy B. White, and Nancy Cook, *Trump tosses coronavirus shutdowns back to the states*, POLITICO, (April 16, 2020), <https://www.politico.com/news/2020/04/16/trump-plan-for-reopening-economy-191073>.

<sup>25</sup> Brian Mann, *Despite Mask Wars, Americans Support Aggressive Measures To Stop COVID-19, Poll Finds*, NPR, (Aug. 4, 2020), <https://www.npr.org/2020/08/04/898522180/despite-mask-wars-americans-support-aggressive-measures-to-stop-covid-19-poll-fi>.

<sup>26</sup> Mexico News Daily, *'Wear a face mask: ' government attempts to clarify a muddied message*, (July 29, 2020), <https://mexiconewsdaily.com/news/coronavirus/wear-a-face-mask-government-attempts-to-clarify-a-muddied-message/>.

<sup>27</sup> *Id.*

<sup>28</sup> World Bank, *Doing Business 2020*, <https://www.worldbank.org/content/dam/doingBusiness/country/m/mexico/MEX.pdf>, Nation Master, *Square Miles: Countries Compared*, (2013), <https://www.nationmaster.com/country-info/stats/Geography/Land-area/Square-miles>.



miles and is home to 328.2 million people.<sup>29</sup> Logistically speaking, Mexico is home to a much larger population in a much smaller area.

Due to high levels of poverty and inadequate work conditions in Mexico, overcrowding is unavoidable. Around 31 million workers make up the informal sector.<sup>30</sup> For example, in Mexico City, there are roughly 1.3 million people working in the streets, selling food, candy, clothes, and more, or providing services like shoe-shining, and entertainment.<sup>31</sup> Mexican citizens, adults and children alike, in the border areas participate in similar activities to generate income.<sup>32</sup> When driving across the border, lines of cars are paralleled by lines of people, who sell food and other items through car windows.<sup>33</sup> In addition to crowding in the streets, neighborhoods are considerably congested.<sup>34</sup> Most areas in Mexico are considered low income, or more so, impoverished.<sup>35</sup> For this reason, affordable, adequate housing is not widely available, and makeshift houses are built closely together.<sup>36</sup>

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<sup>29</sup>Nation Master, *Square Miles: Countries Compared*, (2013), <https://www.nationmaster.com/country-info/stats/Geography/Land-area/Square-miles>, United States Census Bureau, *Quick Facts; United States*, (July 1, 2019), <https://www.census.gov/quickfacts/fact/table/US/PST045219>.

<sup>30</sup> Sharay Angulo, Alberto Fajardo, and Anthony Esposito, *MEXICO SHEDS 344,500 FORMAL JOBS IN MAY TO PUSH CORONAVIRUS LOSSES ABOVE 1 MILLION*, PUERTO VALLARTA DAILY NEWS, (June 12, 2020), <https://www.vallartadaily.com/mexico-sheds-344500-formal-jobs-in-may-to-push-coronavirus-losses-above-1-million/>.

<sup>31</sup> Carrie Kahn, *For Mexican Street Vendors, Coronavirus Means A Huge Loss of Income*, NPR, (April 6, 2020), <https://www.npr.org/2020/04/06/828303859/for-mexican-street-vendors-coronavirus-means-a-huge-loss-of-income>.

<sup>32</sup> Patrick McDonnell, *Tijuana's Children of Despair: Street Urchins Try to Eke Out Living From Tourists*, LOS ANGELES TIMES, (April 6, 1987), <https://www.latimes.com/archives/la-xpm-1987-04-06-me-93-story.html>.

<sup>33</sup> *Id.*

<sup>34</sup> Scott Beyer, *Mexico City's Grave Housing Circumstance*, FORBES, (Oct. 27, 2019), <https://www.forbes.com/sites/scottbeyer/2019/10/27/mexico-citys-grave-housing-circumstance/#2c6f36214ec8>.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

Migrant housing in Mexico is similar; detention centers and shelters are small, yet home to hundreds of people, making social distancing and proper sanitation physically impossible.<sup>37</sup>

The majority of U.S. citizens live in stark contrast to many citizens in Mexico.<sup>38</sup> Poverty and homelessness exist at much lower levels, and the U.S. is considered a developed country, with high access to necessities like food, water, shelter, and electricity.<sup>39</sup> In contrast, Mexico is considered a developing country, where basic resources are hard to access, especially for entire families.<sup>40</sup> This indicates that the overall population of Mexico as a whole was already much more disadvantaged than that of the U.S. before the onset of the COVID-19 pandemic. For the sake of humanity, the U.S. must address the further inequities in Mexico caused by the Migrant Protection Protocols and CDC Order, especially regarding healthcare access.

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<sup>37</sup> Kirk Semple, *Overflowing Toilets, Bedbugs and High Heat: Inside Mexico's Migrant Detention Centers*, NEW YORK TIMES, (Aug. 2, 2019), <https://www.nytimes.com/2019/08/03/world/americas/mexico-migration-conditions.html>, Jennifer Kastner, *Glimpse at life inside Tijuana migrant shelter during the pandemic*, ABC 10NEWS, (Apr. 13, 2020), <https://www.10news.com/news/coronavirus/glimpse-at-life-inside-tijuana-migrant-shelter-during-the-pandemic>.

<sup>38</sup> Index mundi, *United States vs. Mexico*, (2019), <https://www.indexmundi.com/factbook/compare/united-states.mexico>.

<sup>39</sup> Index mundi, *United States vs. Mexico*, (2019), <https://www.indexmundi.com/factbook/compare/united-states.mexico>, UN, *Country Classification*, (2014), [https://www.un.org/en/development/desa/policy/wesp/wesp\\_current/2014wesp\\_country\\_classification.pdf](https://www.un.org/en/development/desa/policy/wesp/wesp_current/2014wesp_country_classification.pdf).

<sup>40</sup> UN, *Country Classification*, (2014), [https://www.un.org/en/development/desa/policy/wesp/wesp\\_current/2014wesp\\_country\\_classification.pdf](https://www.un.org/en/development/desa/policy/wesp/wesp_current/2014wesp_country_classification.pdf).

Healthcare in Mexico is also inadequate. Prior to 2020, Mexican healthcare was much different than it is now. Public healthcare functioned through the national social security programs such as Instituto Mexicano de Seguro Social (IMSS) and the public health insurance program, Seguro Popular.<sup>41</sup> IMSS still provides healthcare today, but only to those who can work; enrollment is based on employment and encourages Mexican citizens to find work in order to have access to healthcare.<sup>42</sup> Employees essentially pay for their healthcare by deductions from their salaries.<sup>43</sup> Citizens who are unemployed or not employed by companies that are covered by IMSS can pay into the system by contributing an annual fee.<sup>44</sup> Seguro Popular was the system for low income citizens who previously could not afford to pay into IMSS, and fees varied based on income.<sup>45</sup> When AMLO was elected, he created a new public healthcare system, Instituto de Salud para el Bienestar (INSABI) which he claimed would be 100% free for everyone.<sup>46</sup> Unfortunately, this is not the case as Mexican citizens are expected to pay for services and medicines, which likely prevents impoverished Mexican citizens from

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<sup>41</sup> Brenda Yañez, *¡Adiós al Seguro Popular! Esto es lo que plantea el gobierno*, EXPANSIÓN POLÍTICA, (July 12, 2019), <https://politica.expansion.mx/mexico/2019/07/12/desaparece-seguro-popular-2019-instituto-de-salud-bienestar>.

<sup>42</sup> Allianz Care, *Healthcare in Mexico*, (last visited Aug. 8, 2020), <https://www.allianzcare.com/en/support/health-and-wellness/national-healthcare-systems/healthcare-in-mexico.html#:~:text=Public%20healthcare%20in%20Mexico,medical%20services%20and%20prescription%20drugs>.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> Qroo Paul, *Mexico: A Look at the Health Program that Replaced Seguro Popular*, TWO EXPATS MEXICO, (Jan. 2, 2020), <https://qroo.us/2020/01/02/mexico-a-look-at-the-health-program-that-replaced-seguro-popular/>.

having any coverage at all.<sup>47</sup> This sharply contrasts the healthcare situation in the U.S. where public healthcare programs like Medicaid exist for low-income, non-working individuals.<sup>48</sup> Even the poorest U.S. citizens have the ability to access healthcare, albeit difficult to do so due to various personal restrictions.<sup>49</sup>

Asylum camps, most often located in border states, exemplify the lack of adequate health care for U.S. asylum seekers returned to Mexico. In the border state Tamualipas, located opposite of Texas, there are approximately 2,000 asylum seekers living in tents spaced six feet apart.<sup>50</sup> Asylum seekers attempt safety at night by sleeping head to toe, but realistically, this does not guarantee any protection from infection.<sup>51</sup> Additionally, asylum seekers, who await decisions for their claims, form lines at U.S. ports of entry in order to find answers or attempt to partake in their asylum hearings.<sup>52</sup> The streets, facilities, and lines at the border are

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<sup>47</sup> Infobae, “*El Insabi no garantiza atención gratuita*”: el líder sindical de la Secretaría de Salud refutó a López Obrador, (Jan. 12, 2020), <https://www.infobae.com/america/mexico/2020/01/12/el-insabi-no-garantiza-atencion-gratuita-el-lider-sindical-de-la-secretaria-de-salud-refuto-a-lopez-obrador/>.

<sup>48</sup> U.S. Department of Health and Human Services, *What is the difference between Medicare and Medicaid?*, (last visited Aug. 8, 2020), <https://www.hhs.gov/answers/medicare-and-medicaid/what-is-the-difference-between-medicare-medicaid/index.html>.

<sup>49</sup> Homeless individuals, for example, often lack resources like cellphones, internet service, addresses, or transportation necessary to apply for healthcare.

<sup>50</sup> Patrick J. McDonnell, *Aid workers seek to avoid coronavirus outbreak at Matamoros migrant camp*, LOS ANGELES TIMES, (Apr. 5, 2020), <https://www.latimes.com/world-nation/story/2020-04-05/amid-coronavirus-fears-residents-volunteers-seek-to-avoid-outbreak-at-matamoros-migrant-camp>, Alfredo Peñ'a, 1<sup>st</sup> COVID-19 case in asylum seeker camp at US- Mexico border, THE FLORIDA TIMES UNION, ( June 30, 2020), <https://www.jacksonville.com/ZZ/news/20200630/1st-covid-19-case-in-asylum-seeker-camp-at-us-mexico-border>.

<sup>51</sup> Alfredo Peñ'a, 1<sup>st</sup> COVID-19 case in asylum seeker camp at US- Mexico border, THE FLORIDA TIMES UNION, (June 30, 2020), <https://www.jacksonville.com/ZZ/news/20200630/1st-covid-19-case-in-asylum-seeker-camp-at-us-mexico-border>.

<sup>52</sup> Curt Prendergast, *Asylum seekers face changing policies, postponed court dates*, TUCSON.COM, (June 13, 2020), [https://tucson.com/news/local/asylum-seekers-face-changing-policies-postponed-court-dates/article\\_3dfbb00a-718a-5bc7-a100-6594e88c7dca.html](https://tucson.com/news/local/asylum-seekers-face-changing-policies-postponed-court-dates/article_3dfbb00a-718a-5bc7-a100-6594e88c7dca.html).

all high risk situations that asylum seekers are forced into by the Migrant Protection Protocols, which requires they remain in Mexico while awaiting claims, and the CDC order, which allows DHS to remove asylum seekers to Mexico whether or not they actually pose an immediate health threat in the U.S.<sup>53</sup> Additionally, due to the delay in processing claims in the U.S., asylum seekers approach the border on incorrect dates, never having been given a concrete hearing date.<sup>54</sup> The insubstantial amount of information provided by the U.S. regarding asylum claims ensures that asylum seekers frequently put themselves at risk of contracting COVID-19 without providing any means for their safety.<sup>55</sup> While the U.S. did contribute aid to Mexico by selling 211 ventilators to the country, the conditions created by the Migrant Protection Protocols and the CDC order indicate that the U.S. is causing more harm than good for their neighbor country.<sup>56</sup>

Asylum seekers deserve humane treatment, as do all people in the U.S. The U.S. understands the necessity of shelter for homeless individuals during the COVID-19 pandemic. The San Diego Convention Center, for example, has been

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<sup>53</sup> Kirstjen M.Nielsen, *Policy Guidance for Implementation of the Migrant Protection Protocols*, HOMELAND SECURITY, (Jan. 25, 2019), [https://www.dhs.gov/sites/default/files/publications/19\\_0129\\_OPA\\_migrant-protection-protocols-policy-guidance.pdf](https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf), 42 C.F.R. §71 (2020), <https://www.federalregister.gov/documents/2020/03/24/2020-06238/control-of-communicable-diseases-foreign-quarantine-suspension-of-introduction-of-persons-into>.

<sup>54</sup> Curt Prendergast, *Asylum seekers face changing policies, postponed court dates*, TUCSON.COM, (June 13, 2020), [https://tucson.com/news/local/asylum-seekers-face-changing-policies-postponed-court-dates/article\\_3dfbb00a-718a-5bc7-a100-6594e88c7dca.html](https://tucson.com/news/local/asylum-seekers-face-changing-policies-postponed-court-dates/article_3dfbb00a-718a-5bc7-a100-6594e88c7dca.html).

<sup>55</sup> *Id.*

<sup>56</sup> BBC News, *Mexico receives ventilator shipment from US*, (May 6, 2020), <https://www.bbc.com/news/world-latin-america-52560839>.

converted into a shelter for the homeless where they can access basic resources and health care.<sup>57</sup> Asylum seekers escaping this type of situation themselves deserve this same humanitarian aid during this time.

As knowledge about COVID-19 increases, experts are increasingly aware of how and in what instances the virus transmits between people. Experts across the world discourage people from gathering with others outside of their household, even in outdoor settings, because despite ventilation, which combats transmission, infection is still prominent among large groups of people, especially when masks are not worn.<sup>58</sup> This means that due to crowding throughout Mexico, despite mask wearing, areas in Mexico, specifically places where asylees are sheltered, are potential breeding grounds for COVID-19. Forcing asylum seekers into this situation ignores their humanity, and the U.S. must do better.

## **Applicable Law**

### ***Asylum Procedure & Constitutional Law***

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<sup>57</sup> The City of San Diego, *Preparations Underway to Open All of Golden Hall, Parts of Convention Center to Serve Homeless Individuals*, (Mar. 23, 2020), <https://www.sandiego.gov/mayor/news/releases/preparations-underway-open-all-golden-hall-parts-convention-center-serve-homeless>.

<sup>58</sup> Brian McCLoskey, Alimuddin Zumla, Giuseppe Ippolito, Lucille Blumberg, Paul Arbon, Anita Cicero, Time Endericks, Poh Lian Lim, Maya Borodina, and WHO Novel Coronavirus-19 Mass Gatherings Expert Group, *Mass gathering events and reducing further global spread of COVID-19: a political and public health dilemma*, NATIONAL CENTER FOR BIOTECHNOLOGY INFORMATION, (Mar. 20, 2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7138150/>, Dirk VanderHart, *Oregon's mask rules expanding to crowded outdoor spaces as COVID cases spike*, OREGON PUBLIC BROADCASTING, (Jul. 13, 2020), <https://www.opb.org/news/article/oregon-coronavirus-covid-19-face-mask-rules/>.

According to the Fifth and Fourteenth Amendments of the U.S. Constitution, persons of the United States cannot be deprived life or liberty without due process of law, and are guaranteed equal protection under the law.<sup>59</sup> The Fifth Amendment applies federally, as does the rest of the Bill of Rights, while the Fourteenth Amendment applies to the states.<sup>60</sup> The similarities between the amendments inspires analysis of the Fifth Amendment protections buttressed by analysis of the Fourteenth. Because of the legal requirements of asylum procedure, which necessitate physical presence within the U.S. to qualify, asylum seekers are guaranteed the constitutional rights to life, liberty, and property.<sup>61</sup> By forcing asylum seekers to remain in Mexico while their claims are being processed and removing asylum seekers under the CDC order, all before the opportunity for a hearing during the COVID-19 pandemic, the U.S. denies asylum seekers their rights to life and liberty without a legitimate opportunity for due process. Migrants who apply for asylum do so because they fear persecution, and often death, in their home countries due to their race, religion, nationality, group membership, or political opinion.<sup>62</sup> USCIS specifically states that migrants seek asylum in the U.S.

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<sup>59</sup> U.S. Const. amend XIV, CORNELL LAW SCHOOL, (last visited Aug. 8, 2020), <https://www.law.cornell.edu/constitution/amendmentxiv>, U.S. Const. amend V, CORNELL LAW SCHOOL, (last visited Aug. 8, 2020), [https://www.law.cornell.edu/wex/fifth\\_amendment](https://www.law.cornell.edu/wex/fifth_amendment).

<sup>60</sup> Kathleen M. Sullivan and Noah Feldman, *Constitutional Law*, 441 (19th ed. 2016).

<sup>61</sup> U.S. Citizenship and Immigration Services, *The Affirmative Asylum Process*, DEPARTMENT OF HOMELAND SECURITY, (April 19, 2019), <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/the-affirmative-asylum-process>.

<sup>62</sup> U.S. Citizenship and Immigration Services, *Asylum*, DEPARTMENT OF HOMELAND SECURITY, (Aug. 6, 2020), <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum>.

for protection, yet during an international pandemic, the U.S. intentionally turns them away, or removes them, ultimately placing them in danger of losing their lives, in a situation where they lack basic liberties.<sup>63</sup>

Asylum procedure is written in such a way that asylum seekers are given constitutional protections. Although asylum law itself is concerned with protecting asylum seekers from persecution, asylum seekers' possession of constitutional rights indicates that during the COVID-19 pandemic, the U.S. government is obligated to protect them from much more. The Migrant Protection Protocols, also known as the Remain in Mexico policy, force asylum seekers to remain in Mexico and risk losing their lives to COVID-19 without due process of law<sup>64</sup> they are assured under the U.S. constitution.<sup>65</sup> Additionally, the CDC order allows DHS to remove asylum seekers from the U.S. into dangerous situations in Mexico under the unfounded assertion that asylum seekers pose a health threat to U.S. citizens.<sup>66</sup> Due process is especially important to vulnerable populations like asylum seekers

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<sup>63</sup> U.S. Citizenship and Immigration Services, *Asylum*, DEPARTMENT OF HOMELAND SECURITY, (Aug. 6, 2020), <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum>, Human Rights Watch, *US: COVID-19 Policies Risk Asylum Seekers' Lives*, (Apr. 2, 2020), <https://www.hrw.org/news/2020/04/02/us-covid-19-policies-risk-asylum-seekers-lives>.

<sup>64</sup> Due Process of law encompasses a person's right to procedurally and substantively fair legal proceedings before they are deprived rights to life, liberty, and property, Legal Information Institute, *Due Process of Law*, CORNELL LAW SCHOOL, (last visited Aug. 10, 2020), <https://www.law.cornell.edu/constitution-conan/amendment-14/section-1/due-process-of-law#:~:text=The%20Due%20Process%20Clause%20provides,without%20due%20process%20of%20law.&text=Fur,ther%2C%20there%20is%20no%20doubt,without%20due%20process%20of%20law>.

<sup>65</sup> Human Rights Watch, *US: COVID-19 Policies Risk Asylum Seekers' Lives*, (Apr. 2, 2020), <https://www.hrw.org/news/2020/04/02/us-covid-19-policies-risk-asylum-seekers-lives>.

<sup>66</sup> U.S. Department of Health and Human Services Centers for Disease Control and Prevention, *Amendment and Extension of Order Suspending Introduction of Certain Persons From Countries Where A Communicable Disease Exists*, (May 19, 2020), [https://www.cdc.gov/quarantine/pdf/CDC-265-Order-Renewal\\_5-19-20-p.pdf](https://www.cdc.gov/quarantine/pdf/CDC-265-Order-Renewal_5-19-20-p.pdf).



because when done correctly, it ensures humane treatment instead of prisoner-like treatment. Without due process, asylum seekers are forgotten and left to suffer by the U.S. who should be protecting their lives and liberty.

In order to apply for asylum, an individual must be present in the United States at a port of entry.<sup>67</sup> The U.S. Citizenship and Immigration Services lists the steps in the Affirmative Asylum Process; step one being arrival in the U.S.<sup>68</sup> Asylum law encourages migrants traveling through Mexico to approach the U.S. and cross the border at a port of entry where they can file a claim for asylum. Once inside the U.S., asylum seekers have constitutional rights according to the Fifth and Fourteenth Amendments which define the rights to life, liberty, and property of “any person” in the country, regardless of immigration status.<sup>69</sup> The rights to life, liberty, and property are crucial to all people in the U.S. The government cannot infringe upon these rights without affording due process, which implies the inherence of rights to life, liberty, and property of U.S. persons.<sup>70</sup> Due process is the positive “red tape” that protects these rights by guaranteeing fair proceedings to everyone present in the U.S., even undocumented immigrants.

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<sup>67</sup> U.S. Citizenship and Immigration Services, *The Affirmative Asylum Process*, DEPARTMENT OF HOMELAND SECURITY, (April 19, 2019), <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/the-affirmative-asylum-process>.

<sup>68</sup> *Id.*

<sup>69</sup> U.S. Const. amend XIV, CORNELL LAW SCHOOL, (last visited Aug. 8, 2020), <https://www.law.cornell.edu/constitution/amendmentxiv>, U.S. Const. amend V, CORNELL LAW SCHOOL, (last visited Aug. 8, 2020), [https://www.law.cornell.edu/wex/fifth\\_amendment](https://www.law.cornell.edu/wex/fifth_amendment).

<sup>70</sup> *Id.*

The Supreme Court acknowledged that undocumented individuals are considered persons of the U.S. in *Plyler v. Doe* when the Texas state government attempted to prevent undocumented children from attending public school due to their status.<sup>71</sup> The court held that this violated the children's Fourteenth Amendment rights to equal protection under the law.<sup>72</sup> In order to deny public education to undocumented children and infringe upon their right to equal protection, the court decided that the state must show their action furthers a substantial state interest.<sup>73</sup> The Trump Administration continues to argue that restricting immigration during the COVID-19 pandemic is for the sake of public health, which is likely seen as a substantial state interest.<sup>74</sup> However, travel between countries has not ceased, which indicates the futility of these restrictions. Public health is not impacted by the immigration process any more than it is by consistent border-crossing travel by U.S. citizens. No justifiable substantial state interest is furthered by these laws.

The Fourteenth Amendment intentionally distinguishes between citizens and persons of the United States.<sup>75</sup> By initially defining citizens and relaying their

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<sup>71</sup> *Plyler v. Doe*, 457 U.S. 202, 226 (1982).

<sup>72</sup> *Id.* at 224.

<sup>73</sup> *Id.* at 230.

<sup>74</sup> 42 C.F.R. §71 (2020), <https://www.federalregister.gov/documents/2020/03/24/2020-06238/control-of-communicable-diseases-foreign-quarantine-suspension-of-introduction-of-persons-into>.

<sup>75</sup> U.S. Const. amend XIV, CORNELL LAW SCHOOL, (last visited Aug. 8, 2020), <https://www.law.cornell.edu/constitution/amendmentxiv>.

rights under the Fourteenth Amendment and then separately defining and relaying the rights of “any person,” due process and equal protection are guaranteed to undocumented individuals, before a state deprives them of life, liberty, or property.<sup>76</sup> The same applies to the Fifth Amendment, due to its near identical phrasing to the Fourteenth Amendment.<sup>77</sup> “Any person” includes asylum seekers specifically because they are physically present in the U.S. when they arrive at a port of entry.<sup>78</sup> Not only are ports of entry physically located within U.S. borders, but asylum procedure requires it.<sup>79</sup> The process to apply for refuge from outside the U.S. is a separate procedure entirely.<sup>80</sup> Migrants who cannot pass through the U.S. and apply for asylum are legally considered refugees.<sup>81</sup> Conversely, refugees are not considered persons of the U.S. until they are within U.S. borders or have been approved for refugee status that acknowledges their legal standing in the U.S.

After arrival in the U.S., step two in the Affirmative Asylum Process is submitting an asylum application, which requires asylum seekers file the Form I-

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<sup>76</sup> *Id.*

<sup>77</sup> U.S. Const. amend XIV, CORNELL LAW SCHOOL, (last visited Aug. 8, 2020), <https://www.law.cornell.edu/constitution/amendmentxiv>, U.S. Const. amend V, CORNELL LAW SCHOOL, (last visited Aug. 8, 2020), [https://www.law.cornell.edu/wex/fifth\\_amendment](https://www.law.cornell.edu/wex/fifth_amendment).

<sup>78</sup> U.S. Citizenship and Immigration Services, *The Affirmative Asylum Process*, DEPARTMENT OF HOMELAND SECURITY, (April 19, 2019), <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/the-affirmative-asylum-process>.

<sup>79</sup> U.S. Customs and Border Protection, *Locate a Port of Entry in California*, (last visited Aug. 8, 2020), <https://www.cbp.gov/contact/ports/ca>, U.S. Citizenship and Immigration Services, *The Affirmative Asylum Process*, DEPARTMENT OF HOMELAND SECURITY, (April 19, 2019), <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/the-affirmative-asylum-process>.

<sup>80</sup> U.S. Citizenship and Immigration Services, *Refugees*, DEPARTMENT OF HOMELAND SECURITY, (May 7, 2020), <https://www.uscis.gov/humanitarian/refugees-and-asylum/refugees>.

<sup>81</sup> *Id.*

589 Application for Asylum and for Withholding of Removal, “within one year of your last arrival in the U.S.”<sup>82</sup> Essentially, this second step encourages asylees to cross the border and remain in the U.S. without legal status. By filing this application, USCIS is prevented from commencing removal proceedings against asylum seekers, which further displays their right to be recognized as “any person in the U.S.” under the Fifth and Fourteenth Amendments.<sup>83</sup> The Migrant Protection Protocols violate the intention behind the Application for Asylum to keep asylum seekers safe from threats to their lives or liberty. While the focus of asylum is typically on protection from persecution, the COVID-19 pandemic requires increased protection to ensure that asylum seekers have the ability to survive the pandemic, live to see the day of their hearings, and experience the safety in the U.S. that brought them to the U.S.-Mexico border in the first place.

According to the Form I-589 instructions, withholding of removal only applies when an asylum seeker can establish that “it is more likely than not that [their] life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion” in their home country.<sup>84</sup> This only protects an asylum seeker from being returned to their country

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<sup>82</sup> U.S. Citizenship and Immigration Services, *The Affirmative Asylum Process*, DEPARTMENT OF HOMELAND SECURITY, (April 19, 2019), <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/the-affirmative-asylum-process>.

<sup>83</sup> *Id.*

<sup>84</sup> Department of Homeland Security, *I-589, Application for Asylum and for Withholding of Removal*, 3, (Sept. 9, 2019), <https://www.uscis.gov/sites/default/files/document/forms/i-589instr.pdf>.

of origin, meaning an asylum seeker can be removed to a third country.<sup>85</sup> However, an asylum seeker may only be removed to a third country where their life or liberty would not be threatened, as opposed to somewhere entirely safe.<sup>86</sup> Due to their vulnerability, asylum seekers make up their own social group that lacks legitimate protection by the U.S. and Mexican governments. USCIS is willfully endangering asylum seekers by removing them to Mexico where their lives and liberty are threatened by COVID-19, due to a lack of health protections and shelter, in addition to the already present threat of violent cartel groups.<sup>87</sup>

I-589 applicants are not solely from countries other than Mexico, however.<sup>88</sup> Although the Migrant Protection Protocols are intended to apply to non-Mexicans, Mexican applicants for asylum have been removed to Mexico while seeking protection from persecution.<sup>89</sup> By removing Mexican asylum seekers to asylum camps across the border, the Migrant Protection Protocols also violate section 241(b)(3) of the INA, that intends to prevent asylum seekers from being returned to the country where they legitimately fear persecution.<sup>90</sup> Mexican asylum seekers

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<sup>85</sup> *Id.* at 3.

<sup>86</sup> *Id.*

<sup>87</sup> Jonathan Blitzer, *HOW THE U.S. ASYLUM SYSTEM IS KEEPING MIGRANTS AT RISK IN MEXICO*, THE NEW YORKER, (Oct. 1, 2019), <https://www.newyorker.com/news/dispatch/how-the-us-asylum-system-is-keeping-migrants-at-risk-in-mexico>.

<sup>88</sup> Zachary Mueller, *Immigration 101: What is 'Remain in Mexico', or the Migration Protection Protocols (MPP)?*, AMERICA'S VOICE EDUCATION FUND, (Feb. 28, 2019), <https://americasvoice.org/blog/remain-in-mexico-mpp/>.

<sup>89</sup> *Id.*

<sup>90</sup> Immigration and Nationality Act, USC Title 8, (Jul. 10, 2019), <https://www.uscis.gov/laws-and-policy/legislation/immigration-and-nationality-act>.

are not only forced to risk their lives in a country where they already do not feel safe, but now must risk their lives in a country where the risks of infection and death by COVID-19 are high.

The third step in the asylum application process requires asylum seekers to attend biometrics appointments to have fingerprinting and background checks completed.<sup>91</sup> Similarly, the fourth and fifth steps require asylum seekers apply for and attend an in-person interview that takes place within the U.S.<sup>92</sup> At the beginning of the COVID-19 pandemic, USCIS halted in-person immigration services.<sup>93</sup> USCIS was preparing to reopen by June 4, 2020, but according to the USCIS website, many offices are slated to close “until further notice.”<sup>94</sup> The biometrics offices, interview offices, and immigration courts intended for use by asylum applicants are all located in the United States, further emphasizing the importance and intention that asylum seekers remain present in the U.S.<sup>95</sup>

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<sup>91</sup> U.S. Citizenship and Immigration Services, *The Affirmative Asylum Process*, DEPARTMENT OF HOMELAND SECURITY, (Apr. 19, 2019), <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/the-affirmative-asylum-process>.

<sup>92</sup> *Id.*

<sup>93</sup> U.S. Citizenship and Immigration Services, *USCIS Preparing to Resume Public Services on June 4*, DEPARTMENT OF HOMELAND SECURITY, (May 27, 2020), <https://www.uscis.gov/news/alerts/uscis-preparing-to-resume-public-services-on-june-4>.

<sup>94</sup> U.S. Citizenship and Immigration Services, *USCIS Preparing to Resume Public Services on June 4*, DEPARTMENT OF HOMELAND SECURITY, (May 27, 2020), <https://www.uscis.gov/news/alerts/uscis-preparing-to-resume-public-services-on-june-4>, U.S. Citizenship and Immigration Services, *USCIS Office Closings*, DEPARTMENT OF HOMELAND SECURITY, (Aug. 7, 2020), <https://www.uscis.gov/about-us/uscis-office-closings>.

<sup>95</sup> U.S. Citizenship and Immigration Services, *USCIS Office Closings*, DEPARTMENT OF HOMELAND SECURITY, (Aug. 7, 2020), <https://www.uscis.gov/about-us/uscis-office-closings>.

Often, asylum seekers who approach at a port of entry without proper documentation, are immediately subject to the expedited removal process.<sup>96</sup> When applying for affirmative asylum upon arrival at a U.S. port of entry, an asylum seeker is expected to have documentation that deems asylum seekers admissible, which includes a passport or a U.S. visa.<sup>97</sup> If an asylum seeker is placed in removal proceedings, they must then partake in the defensive asylum application process.<sup>98</sup> Due to the expedited removal process, many asylum seekers who identify themselves at a port of entry must apply for asylum under this alternate process. The defensive process begins when an asylum seeker is “caught” by Customs and Border Protection (CBP) and found to have a credible fear of returning to their home country during a credible fear screening<sup>99,100</sup> If the asylum seeker is determined by CBP to have a credible fear of returning to their home country, they are then given a date for a hearing, where an immigration judge determines their

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<sup>96</sup> Bipartisanpolicy.org, *Claiming Asylum in the United States: Entering at a Port of Entry*, (last visited Aug. 8, 2020), <https://bipartisanpolicy.org/wp-content/uploads/2019/04/Claiming-Asylum-at-and-between-Ports-of-Entry.pdf>.

<sup>97</sup> *Id.*

<sup>98</sup> U.S. Citizenship and Immigration Services, *Obtaining Asylum in the United States*, DEPARTMENT OF HOMELAND SECURITY, (Oct. 19, 2015), <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/obtaining-asylum-in-the-united-states>.

<sup>99</sup> A credible fear screening is conducted during expedited removal proceedings and determines whether there is a significant possibility or well-rounded fear of persecution or torture in an asylum seeker’s home country. If credible fear is established, a hearing for the asylum seeker’s claim is ordered, U.S. Citizenship and Immigration Services, *Questions and Answers: Credible Fear Screening*, DEPARTMENT OF HOMELAND SECURITY, (July 15, 2020), <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/questions-and-answers-credible-fear-screening>.

<sup>100</sup> U.S. Citizenship and Immigration Services, *Obtaining Asylum in the United States*, DEPARTMENT OF HOMELAND SECURITY, (Oct. 19, 2015), <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/obtaining-asylum-in-the-united-states>.

immigration status.<sup>101</sup> Typically, those seeking asylum through the defensive process are held in U.S. detention centers while awaiting their credible fear interviews and the final decision on those claims.<sup>102</sup> Once the claims are granted, asylum seekers may remain in detention or be released with a sponsor.<sup>103</sup> Regardless of which asylum process an asylum seeker finds themselves in, they are within U.S. borders, and therefore subject to the protections of the Fifth and Fourteenth Amendments.

The Migrant Protection Protocols violate the constitutional rights of both Mexican and non-Mexican asylum seekers. As persons of the U.S., asylum seekers have a right to due process before experiencing deprivation of life or liberty. By returning asylum seekers to Mexico where they are at risk of infection by COVID-19 before they have the opportunity for a hearing, USCIS and the Trump Administration endanger the lives of vulnerable people they are supposed to protect. This infringes upon the basic liberty to experience due process which would determine asylum seekers' rightful eligibility for removal. Even asylum seekers who are denied asylum under the affirmative application process have a

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<sup>101</sup> *Id.*

<sup>102</sup> Kristen M. Jarvis Johnson, *Fearing the United States: Rethinking Mandatory Detention of Asylum Seekers*, (2), ADMINISTRATIVE LAW REVIEW, (last visited Aug. 8, 2020), <http://www.administrativelawreview.org/wp-content/uploads/2014/04/Fearing-the-United-States-Rethinking-Mandatory-Detention-of-Asylum-Seekers.pdf>.

<sup>103</sup> Asylum-Seekers Sponsorship Project, *More on sponsorship*, (last visited Aug. 10, 2020), <https://www.asylumsponsorshipproject.org/more-on-sponsorship.html>.



chance to be heard in front of an immigration judge before being removed to another country.<sup>104</sup>

Additionally, as both detainees and asylum applicants, asylum seekers face a deprivation of liberty due to a reliance on the U.S. government for protection. While the Migrant Protection Protocols cannot be equated to legal removal of asylum seekers from the U.S., the practice denies asylum seekers their right to remain in the U.S. throughout the duration of their asylum process. Asylum seekers are meant to either be held in detention where their liberty is subject to government officials or released with sponsors or volunteers where they would be at liberty to find care for themselves.<sup>105</sup> By continuing to remove asylum seekers to Mexico throughout the COVID-19 pandemic, asylum seekers continue to face deprivation of humanity and basic constitutional rights as persons within the U.S.

## **Legal Analysis**

### ***Hospital Access***

The right to life guaranteed by the Fifth and Fourteenth Amendments to the U.S. Constitution encompasses the government's duty to protect the life of any

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<sup>104</sup> U.S. Citizenship and Immigration Services, *Obtaining Asylum in the United States*, DEPARTMENT OF HOMELAND SECURITY, (Oct. 19, 2015), <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/obtaining-asylum-in-the-united-states>.

<sup>105</sup> Asylum-Seekers Sponsorship Project, *More on sponsorship*, (last visited Aug. 10, 2020), <https://www.asylumsponsorshipproject.org/more-on-sponsorship.html>.

person within the country's borders before due process of law. In the Supreme Court case *Estelle v. Gamble*, it was held that the government is obligated to provide medical care to prisoners because by virtue of imprisonment, they are deprived of their liberty, causing prisoners' inability to care for themselves.<sup>106</sup> Before its codification into case law, this was a common law right to medical care in order to ensure that prisoner's lives were valued and cared for, so as to not deprive them of life even after their chance for due process.<sup>107</sup> This exemplifies that a lack of medical care can be responsible for the deprivation of life protected by the Fifth and Fourteenth Amendments.

While the American Bar Association does not consider immigrants in detention facilities to be prisoners according to their *2010 Standards on Treatment of Prisoners*, it is important to acknowledge that returned asylum seekers and prison inmates are similarly situated in their lack of liberty and ability to provide themselves with medical care, and their reliance on the government to provide it for them.<sup>108</sup> According to the U.N., the deprivation of life involves a "deliberate or foreseeable and preventable life-terminating harm or injury, caused by an act or

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<sup>106</sup> *Estelle v. Gamble*, 429 U.S. 97, 103-104, (1976).

<sup>107</sup> *Id.* at 104.

<sup>108</sup> American Bar Association, *Standards on Treatment of Prisoners*, CRIMINAL JUSTICE STANDARDS, (Feb. 2010), [https://www.americanbar.org/groups/criminal\\_justice/publications/criminal\\_justice\\_section\\_archive/crimjust\\_standards\\_treatmentprisoners/](https://www.americanbar.org/groups/criminal_justice/publications/criminal_justice_section_archive/crimjust_standards_treatmentprisoners/).

omission.”<sup>109</sup> During the COVID-19 pandemic the U.S. is actively returning asylum seekers to Mexico where medical care is inadequate and refusing to participate in generating a solution.<sup>110</sup> The U.S. government is both acting and omitting in such a way that infringes upon the rights to life and liberty guaranteed to asylum seekers before receiving due process. Additionally, it ignores their humanity.

When asylum seekers are returned to Mexico, they are forced into crowded, unsanitary living spaces whether it be in make-shift asylum camps or migrant shelters.<sup>111</sup> The potential for contracting COVID-19 is high for asylum seekers in these situations, and the lack of testing combined with public healthcare deficiencies indicate that asylum seekers are left to suffer on the margins of this pandemic, with no real guarantee that they will avoid contracting the virus or survive it if they do.<sup>112</sup> The Trump Administration has claimed that the Mexican government has agreed to take humanitarian responsibility for asylum seekers sent back to Mexico, but they have not been able to adequately do so during the

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<sup>109</sup> The United Nations Office on Drugs and Crime, *Arbitrary deprivation of life*, (last visited Aug. 8, 2020), <https://www.unodc.org/e4j/en/terrorism/module-8/key-issues/arbitrary-deprivation-of-life.html#:~:text=Generally%20applicable%20principles,36%2C%202017%2C%20para>.

<sup>110</sup> Kirstjen M. Nielsen, *Policy Guidance for Implementation of the Migrant Protection Protocols*, HOMELAND SECURITY, (Jan. 25, 2019), [https://www.dhs.gov/sites/default/files/publications/19\\_0129\\_OPA\\_migrant-protection-protocols-policy-guidance.pdf](https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf), Human Rights Watch, *US: COVID-19 Policies Risk Asylum Seekers' Lives*, (Apr. 2, 2020), <https://www.hrw.org/news/2020/04/02/us-covid-19-policies-risk-asylum-seekers-lives>.

<sup>111</sup> Human Rights Watch, *US: COVID-19 Policies Risk Asylum Seekers' Lives*, (Apr. 2, 2020), <https://www.hrw.org/news/2020/04/02/us-covid-19-policies-risk-asylum-seekers-lives>.

<sup>112</sup> Jasmine Aguilera, *Many Asylum Seekers in Mexico Can't Get U.S. Court Hearings Until 2021. A Coronavirus Outbreak Could 'Devastate' Them*, TIME, (May 19, 2020), <https://time.com/5830807/asylum-seekers-coronavirus-mpp/>.

pandemic.<sup>113</sup> In April, the Mexican government established a formal agreement with private hospitals to ensure available beds to treat COVID-19 patients, which has since come to an end on June 23, 2020.<sup>114</sup> This program, however, only extended beds at private hospitals to Mexican citizens who are beneficiaries of the many public healthcare programs available in the country, IMSS, ISSSTE, Insabi, Pemex, SEDENA, and the navy.<sup>115</sup> Applicants for asylum in the U.S., do not have easy access to these public healthcare programs, unless they are citizens of Mexico, which the vast majority of asylum seekers are not.<sup>116</sup> Asylum seekers may try to find legitimate work in Mexico, which would then qualify them for INSABI, but quarantines at asylum camps and shelters are likely to prevent this opportunity during the pandemic.<sup>117</sup> Asylum seekers who arrived from outside of Mexico between April and June and remain homeless in following months are therefore excluded, and do not have access to government sanctioned COVID-19 care.

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<sup>113</sup> Department of Homeland Security, *Migrant Protection Protocols*, (Jan. 24, 2019), <https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols>.

<sup>114</sup> Perla Miranda, *Mexican government to use private hospitals to treat COVID-19 patients*, EL UNIVERSAL, (Apr. 13, 2020), <https://www.eluniversal.com.mx/english/mexican-government-will-use-private-hospitals-treat-covid-19-patients>.

<sup>115</sup> *Id.*

<sup>116</sup> Human Rights Watch, *US: COVID-19 Policies Risk Asylum Seekers' Lives*, (Apr. 2, 2020), <https://www.hrw.org/news/2020/04/02/us-covid-19-policies-risk-asylum-seekers-lives>, AMERICA'S VOICE EDUCATION FUND, (Feb. 28, 2019), <https://americasvoice.org/blog/remain-in-mexico-mpp/>, Maureen Meyer and Elyssa Pachico, *Fact Sheet: U.S. Immigration and Central American Asylum Seekers*, RELIEF WEB, (Mar. 14, 2018), <https://reliefweb.int/report/united-states-america/fact-sheet-us-immigration-and-central-american-asylum-seekers>.

<sup>117</sup> Wendy Fry, *Tijuana's oldest migrant shelter closes to new arrivals to protect against coronavirus*, THE SAN DIEGO UNION TRIBUNE, (Mar. 26, 2020), <https://www.sandiegouniontribune.com/news/border-baja-california/story/2020-03-26/casa-del-migrante-migrant-shelter-closes-for-first-time-to-protect-current-residents-from-coronavirus>.

Mexico is evidently struggling to hospitalize and provide COVID-19 treatment to their own citizens. In Baja California, the Mexican state bordering the U.S. state California, there is a 49% death rate among hospitalized patients.<sup>118</sup> As of mid-July, 2020, 2,337 of the 4,760 people hospitalized for COVID-19 have died.<sup>119</sup> This is the highest death rate in Mexico, however, other states are following closely, with an average death rate of 36%.<sup>120</sup> Mexican citizens are well aware that public hospitals are ill equipped when it comes to managing public health, and often avoid seeking treatment.<sup>121</sup> Many Mexican citizens view hospitals as a place that will exacerbate their illness, rather than heal it.<sup>122</sup> This belief is bolstered by President AMLO's initial statements early on in the pandemic urging citizens to avoid hospitals unless there was an emergency.<sup>123</sup> Six months into the pandemic, it seems that waiting until COVID symptoms are considered urgent might be waiting until it is too late. Additionally, hospitals in Mexico have lost large portions of their staff, contributing to a lack of knowledge on how to properly treat patients.<sup>124</sup> In Guerrero State, for example, some hospitals lost approximately 40% of staff as a result of being sick or in high risk groups.<sup>125</sup> While the Mexican

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<sup>118</sup> Andrea Navarro and Lorena Rios, *Half of Baja California's Coronavirus Patients in Hospitals Are Dying*, BLOOMBERG, (Jul. 19, 2020), <https://www.bloomberg.com/news/articles/2020-07-19/half-of-virus-patients-in-hospitals-die-in-mexico-s-baja-state>.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

government has hired new healthcare workers, they are often “recent graduates with little experience” who might not know how to operate a ventilator.<sup>126</sup>

In a press release explaining the decision to enact the Migrant Protection Protocols, the Trump Administration asserted that the Mexican government has agreed to take humanitarian responsibility for asylum seekers sent back to Mexico.<sup>127</sup> This statement fails to confront the realities of the deficiencies of the public healthcare systems in Mexico and is a blatant violation of the right to life guaranteed to asylum seekers by the federal government specifically under the Fifth Amendment of the U.S. Constitution. Without access to a healthcare system that can adequately diagnose and treat the thousands of asylum seekers the U.S. is sending back, the Trump Administration is inhumanely sentencing them to a life of uncertainty, fear, malnourishment, and potential death, all of which directly contradict a right to life before due process. It is additionally a violation of the right to liberty guaranteed by the Fifth Amendment, because asylum seekers are not at liberty to protect themselves from COVID-19 and are at the mercy of the federal government.

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<sup>126</sup> *Id.*

<sup>127</sup> Department of Homeland Security, *Migrant Protection Protocols*, (Jan. 24, 2019), <https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols>.

In the U.S., liberty is considered to be “freedom from personal restraints created by government or society.”<sup>128</sup> According to asylum law, asylum seekers have the right to remain in detention or with sponsors in the U.S. while their claims are processed.<sup>129</sup> As persons within the U.S., asylum seekers also are guaranteed liberty to do so, without government restraint. This liberty includes the ability to seek health care which includes treatment for COVID-19 during the pandemic.

When in detention, asylum seekers are guaranteed a certain standard of care that includes “screening, prevention, health education, diagnosis, and treatment”.<sup>130</sup> When with a U.S. sponsor, depending on the status of their application, asylum seekers have the ability to apply for Medicaid or purchase private coverage, both of which would include COVID-19 care.<sup>131</sup> This liberty is inhumanely stripped from asylum seekers when they are returned to Mexico because they have no resources to receive or apply for adequate health care. Instead they are physically located in a different country altogether, likely with no mode of transportation, and no way to legally re-enter the U.S. Once in Mexico, asylum seekers have little

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<sup>128</sup> *Liberty*, Bouvier Law Dictionary, (Desk ed. 2012).

<sup>129</sup> Rocky Mountain Immigrant Advocacy Network, *Getting out of Detention: Options for People with Positive Credible Fear Determinations*, (last visited Aug. 8, 2020), [https://static1.squarespace.com/static/57f6bd842e69cf55d8158641/t/58c9e1c737c5813452ac02ef/1489625544976/RMIAN\\_Credible+Fear+Release+Options\\_Handout\\_English.pdf](https://static1.squarespace.com/static/57f6bd842e69cf55d8158641/t/58c9e1c737c5813452ac02ef/1489625544976/RMIAN_Credible+Fear+Release+Options_Handout_English.pdf).

<sup>130</sup> Immigrations and Customs Enforcement, *Detention Standards*, (2011), <https://www.ice.gov/doclib/detention-standards/2011/4-3.pdf>.

<sup>131</sup> Healthcare.gov, *Coverage for lawfully present immigrants*, (last visited Aug. 8, 2020), <https://www.healthcare.gov/immigrants/lawfully-present-immigrants/>.

access to health care in the country because they are not citizens, and instead must rely on global humanitarian aid.<sup>132</sup>

Since the U.S. and Mexican governments have failed to provide hospital space to treat asylum seekers who contract COVID-19, global nonprofits began building field hospitals near the border.<sup>133</sup> U.S. national nonprofits have also begun initiatives to provide sanitization products and protective equipment to asylum camps.<sup>134</sup> Global Response Management (GRM) specifically received approval from the Mexican government to build a field hospital at the border with Texas.<sup>135</sup> The field hospital is to be located near the Rio Grande, which flows along the border of Mexico and Texas, where the migrant camp home to approximately 2,000 migrants exists.<sup>136</sup> With only 20 available beds for COVID patients, the field hospital, although well intended, will likely not meet the health needs of those it was built for if COVID-19 spreads through the camp.<sup>137</sup>

Considering the healthcare standards promulgated by ICE, asylum seekers are denied adequate health care that the U.S. recognizes they deserve when they

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<sup>132</sup> Doctors Without Borders, *Mexico: MSF supports migrants and homeless people at risk for COVID-19*, (Jun. 16, 2020), <https://www.doctorswithoutborders.org/what-we-do/news-stories/story/mexico-msf-supports-migrants-and-homeless-people-risk-covid-19>.

<sup>133</sup> Julia Love, Mica Rosenberg, *Supplies for coronavirus field hospital held up at U.S.-Mexico border*, REUTERS, (Apr. 15, 2020) <https://www.reuters.com/article/us-health-coronavirus-refugee-hospital/supplies-for-coronavirus-field-hospital-held-up-at-u-s-mexico-border-idUSKCN21X2NU>.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*



are removed to Mexico.<sup>138</sup> Although there are complaints regarding the inadequacy of medical care within U.S. detention centers, the inadequacy of makeshift field hospitals are worse, particularly because they are not supported by the U.S. monetarily in regards to buildings, medical supplies, or staff that could significantly bolster the legitimacy of their care.<sup>139</sup> By refraining from involvement in the creation of hospitals to provide COVID-19 treatment for asylum seekers, the U.S. infringes upon their rights to life and liberty. Asylum seekers in this situation lack the liberty to find care because it is scarcely provided, and they lack a right to life because they may become infected with COVID-19 and have no necessary medical aid. No human deserves this maltreatment.

Additionally, the U.S. government has made it increasingly difficult for medical supplies to be transported across the border from the U.S. to Mexico. The U.S. Federal Emergency Management Agency (FEMA) limited exportations of personal protective equipment in early April, citing a need for it within the U.S.<sup>140</sup> The supplies intended for the GRM field hospital were stuck in the U.S., including “an X-ray machine, cots, heart monitors, medical tents, generators, and other

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<sup>138</sup> Immigrations and Customs Enforcement, *Performance Based National Detention Standards*, DEPARTMENT OF HOMELAND SECURITY, (2011), <https://www.ice.gov/doclib/detention-standards/2011/4-3.pdf>.

<sup>139</sup> Thomas J. Rachko, Jr., *Second Covid-19 Death in US Immigration Detention*, HUMAN RIGHTS WATCH, (Jun. 4, 2020), <https://www.hrw.org/news/2020/06/04/second-covid-19-death-us-immigration-detention>.

<sup>140</sup> Julia Love, Mica Rosenberg, *Supplies for coronavirus field hospital held up at U.S.-Mexico border*, REUTERS, (Apr. 15, 2020), <https://www.reuters.com/article/us-health-coronavirus-refugee-hospital/supplies-for-coronavirus-field-hospital-held-up-at-u-s-mexico-border-idUSKCN21X2NU>.

equipment” such as thermometers and rapid COVID-19 tests.<sup>141</sup> Before attempting to bring the equipment across, GRM removed certain supplies like gloves, surgical masks, and N-95 masks, which it felt were more likely to be subject to the FEMA order.<sup>142</sup> GRM has also gathered hundreds of volunteer-made cloth masks that can only be transported across the border in quantities small enough to be considered “for ‘personal use.’”<sup>143</sup>

While it is important for the U.S. to protect its own citizens, this delay in transportation of supplies evidences a disregard for the lives of asylum seekers whom the U.S. refuses to protect despite increased need. Because of the crowded, unsanitary conditions at asylum camps and migrant shelters, the possibility that many were already infected with COVID-19 while the U.S. withheld necessary supplies is high. Without the proper supplies, field hospitals are ineffective. An asylum seeker may have the liberty to find care at a field hospital, however, if that field hospital lacks the necessary medical supplies and equipment required for treatment, the health care is inadequate. This denial of care may lead to a deprivation of life, in this case attributable to a U.S. act: withholding of supplies. As persons in the U.S., a status gained by asylum seekers by nature of the asylum process, they have rights to life and liberty. This includes adequate health care,

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<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

especially during a global pandemic, so that asylum seekers may survive if they become infected. U.S. citizens often express great care for the sanctity of life and empathy towards impoverished countries; ensuring health care and shelter for all suffering people regardless of legal status or constitutional stature will drive us towards that humanitarian end.<sup>144</sup>

### ***Migrant Shelters & Asylum Camps***

When it comes to shelter, asylum seekers do not have many safe options. Many asylum seekers are forced to take shelter in asylum camps located along the border of the U.S. and Mexico, while others are sometimes fortunate enough to find a migrant shelter with space to house them.<sup>145</sup> However, once the pandemic emerged, migrant shelters throughout Mexico closed their doors to new arrivals in an attempt to limit the amount of people inside and curb crowding that would lead to viral spread.<sup>146</sup> The shelters that continue to take in new residents have created isolated spaces for quarantine upon arrival.<sup>147</sup> Some shelters have other limitations in place, such as a shelter-wide quarantine, which prevents migrants from leaving for any reason, even work.<sup>148</sup> Requiring medical aid or presence for an immigration

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<sup>144</sup> Donald J. Trump, *Proclamation on National Sanctity of Human Life Day, 2020*, WHITEHOUSE.GOV, (Jan. 21, 2020), <https://www.whitehouse.gov/presidential-actions/proclamation-national-sanctity-human-life-day-2020/>.

<sup>145</sup> Mia Armstrong, *How Migrant Shelters in Mexico Are Facing COVID-19*, SLATE, (Apr. 13, 2020), <https://slate.com/technology/2020/04/coronavirus-migrant-shelters-mexico.html>.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

process are common exceptions.<sup>149</sup> Some shelters allow their residents to continue working, acknowledging how important it is that migrants continue making money.<sup>150</sup> Certain shelters have helped migrants find alternative shelter in order for migrants to maintain their jobs.<sup>151</sup>

Asylum seekers subject to life in migrant shelters in Mexico are lacking in liberty, in many cases to just be able to live and work freely. While asylum applicants held in detention are typically subject to the same type of physical restrictions or worse, many migrants are typically allowed the opportunity to live with sponsors inside the U.S. where restrictions are scant. There, migrants can make health choices related to COVID-19, quarantine themselves, and apply for a work visa. When forced to remain in Mexico, asylum seekers are forced to give up their liberty.

Migrant shelters do their best to provide sanitary, safe conditions to those residing with them, and collaborate with international health organizations like Doctors Without Borders or hire doctors to provide health care at the shelter.<sup>152</sup> At the shelter La 72, staff conduct health screenings, provide preventative resources and health workshops, and ensure increased sanitation.<sup>153</sup> Doctors Without Borders

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<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

collaborates with La 72 to provide health care access, including COVID-19 treatment when necessary.<sup>154</sup> The shelter also has five isolated spaces for new residents or residents who may show COVID-19 symptoms.<sup>155</sup> However, many staff members must continue to expose themselves by leaving the shelter to go home or shop for supplies.<sup>156</sup> This indicates that despite quarantine and isolation, there is a risk that COVID-19 may be spread by staff members. To quell this concern in their shelter, Casa de Acogida, Formación, y Empoderamiento de la Mujer Migrante y Refugiada has at least two out of five staff members take week long shifts so that throughout their time working at the shelter they are not also exposing themselves at home or otherwise.<sup>157</sup> At the Casa del Migrante shelter in Tijuana, Mexico, six staff members continue in person work in addition to five in person volunteers.<sup>158</sup> The shelter director emphasizes the importance of staff working with the residents, which appears to justify the risk of eleven working staff members.<sup>159</sup> The one doctor hired on staff works five hours a day, five days a week, and would likely not be able to sustain care for multiple migrants afflicted with COVID-19.<sup>160</sup> In another Tijuana shelter, Jardín de Las Mariposas, there is no

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<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

on site doctor, but rather residents are maintaining cleanliness.<sup>161</sup> The director has been working to establish a fund for the shelter's residents who may need to be transferred to hospitals, because without insurance they will be required to pay for health care in cash.<sup>162</sup>

Although migrant shelters are trying and providing as much as they can to the asylum seekers who seek residence and shelter, the risk of contracting COVID-19 in crowded spaces with multiple staff members coming and going daily is high. Additionally, the doctor to patient ratio is inadequate, indicating that not all patients who need care will be able to receive it. At Casa del Migrante, for example, what will happen when a patient's COVID-19 symptoms are exacerbated on a weekend when no doctor is present? Asylum seekers who find themselves in migrant shelters may be better off than those who have stopped and made camp in tents along the border with hundreds of other applicants. However, considering all conditions, asylum seekers are being forced by the U.S. government to lose their humanity and risk the loss of their lives. They are not at liberty to obtain adequate care, find doctors who can provide aid, and isolate from large groups of other

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<sup>161</sup> Yariel Valdés González, *Tijuana shelter protects LGBTQ immigrants from coronavirus*, WASHINGTON BLADE, (Apr. 29, 2020), <https://www.washingtonblade.com/2020/04/29/tijuana-shelter-protects-lgbtq-immigrants-from-coronavirus/>.

<sup>162</sup> *Id.*

people, all of which could be done if they were allowed to reside in the U.S. with a sponsor while awaiting the judgment of their claims.

As mentioned previously, there are approximately 2,000 asylum seekers awaiting the judgment of their claims in makeshift tent camps along the U.S./Mexico border.<sup>163</sup> On June 30, 2020 the first case was detected in the camp and immediate measures were taken to isolate the individual and their family, who had been recently deported from the U.S., where cases are high.<sup>164</sup> The international nonprofit organization, Global Response Management (GRM) has been providing health care services within the camp and was able to provide treatment to the individual.<sup>165</sup> Considering conditions in asylum camps, a COVID-19 outbreak could be devastating among an already vulnerable population. The lack of adequate shelter is difficult for asylum seekers due to extreme heat, which can be strenuous on their health, and potential rain which can destroy any means of shelter.<sup>166</sup> In order to protect the health of migrants GRM set up eighty-eight handwashing stations and provided multivitamins throughout the camp to bolster

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<sup>163</sup> Reliefweb, *Mexico: Asylum seeker stranded in Matamoros tent camp face threat of COVID-19*, (Jul. 21, 2020), <https://reliefweb.int/report/mexico/mexico-asylum-seekers-stranded-matamoros-tent-camp-face-threat-covid-19>.

<sup>164</sup> Alfredo Peña, *1st COVID-19 case in asylum seeker camp at US-Mexico border*, APNEWS, (Jun. 30, 2020), <https://apnews.com/f71169c5099d4205e92af526a074fac0>.

<sup>165</sup> *Id.*

<sup>166</sup> Sister Norma Pimentel, *Covid-19 has come to our migrant camp. IT makes ending the MPP policy even more urgent.*, THE WASHINGTON POST, (Jul. 5, 2020), [https://www.washingtonpost.com/opinions/covid-19-has-come-to-our-migrant-camp-it-makes-ending-the-mpp-policy-even-more-urgent/2020/07/03/455cacf8-bd41-11ea-8cf5-9c1b8d7f84c6\\_story.html](https://www.washingtonpost.com/opinions/covid-19-has-come-to-our-migrant-camp-it-makes-ending-the-mpp-policy-even-more-urgent/2020/07/03/455cacf8-bd41-11ea-8cf5-9c1b8d7f84c6_story.html).

migrant's immune systems.<sup>167</sup> They also built a field hospital with 20 beds for those who may experience symptoms and require isolation.<sup>168</sup> Tents have been set up three feet apart, only half of the distance recommended by the WHO and the CDC, and migrants sleep head to toe, although this would not necessarily combat transmission of the virus when in the same small, enclosed tent.<sup>169</sup> Additionally, after the detection of one COVID case, the National Immigration Institute (NII) in Mexico has not allowed the camps to accept new arrivals.<sup>170</sup> This may be the only reason COVID-19 has not spread throughout asylum camps, to the detriment of hundreds of other asylum seekers being turned away at the U.S. border.

By returning asylum seekers to Mexico, the U.S. guarantees that migrants take shelter in crowded spaces that hardly provide any shelter, let alone protection from COVID-19. Since the NII has refused to allow new arrivals at asylum camps, the U.S. is also assuring that asylum seekers returned to Mexico have virtually nowhere to go.<sup>171</sup> Not only is the likelihood of COVID-19 transmission high once

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<sup>167</sup> Erin Sheridan, *Asylum seekers test positive for coronavirus*, VALLEY MORNING STAR, (Jun. 30, 2020), <https://www.valleymorningstar.com/2020/06/30/asylum-seekers-test-positive-coronavirus/>.

<sup>168</sup> Julia Love, Mica Rosenberg, *Supplies for coronavirus field hospital held up at U.S.-Mexico border*, REUTERS, (Apr. 15, 2020), <https://www.reuters.com/article/us-health-coronavirus-refugee-hospital/supplies-for-coronavirus-field-hospital-held-up-at-u-s-mexico-border-idUSKCN21X2NU>.

<sup>169</sup> Alfredo PeÅ'a, *1st COVID-19 case in asylum seeker camp at US- Mexico border*, THE FLORIDA TIMES UNION, (June 30, 2020), <https://www.jacksonville.com/ZZ/news/20200630/1st-covid-19-case-in-asylum-seeker-camp-at-us-mexico-border>.

<sup>170</sup> Sister Norma Pimentel, *Covid-19 has come to our migrant camp. IT makes ending the MPP policy even more urgent.*, THE WASHINGTON POST, (Jul. 5, 2020), [https://www.washingtonpost.com/opinions/covid-19-has-come-to-our-migrant-camp-it-makes-ending-the-mpp-policy-even-more-urgent/2020/07/03/455cacf8-bd41-11ea-8cf5-9c1b8d7f84c6\\_story.html](https://www.washingtonpost.com/opinions/covid-19-has-come-to-our-migrant-camp-it-makes-ending-the-mpp-policy-even-more-urgent/2020/07/03/455cacf8-bd41-11ea-8cf5-9c1b8d7f84c6_story.html)

<sup>171</sup> *Id.*



it arrives at the camp, but food and water are often scarce.<sup>172</sup> Asylum seekers must rely on outside organizations for food, water, and medical care, and have no way of providing it for themselves.<sup>173</sup> Others who are not lucky enough to take shelter before the first COVID case hit the camps in June are in even more danger and face an even deeper lack of liberty and potential deprivation of life. Not only do they not have anywhere to take shelter, but they lack means of food and water, and do not even have the opportunity to receive aid from organizations like GRM or Doctor's Without Borders unless they find their way to a COVID-19 center on their own. If COVID-19 were to spread throughout the camp again, the likelihood of a large number of migrants being infected is high due to the means of transmission, and 20 beds would likely not be enough to help everyone who needs it.<sup>174</sup> In the case of an outbreak, this would not be enough, and asylum seekers' lives may be lost before ever obtaining their judgment from the U.S. regarding their asylum claims. Respecting the humanity of asylum seekers would benefit the U.S. as well.

Many U.S. citizens, especially those located in border states, have close ties to Mexico and cross the border even during the COVID-19 pandemic for travel and

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<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> Erin Sheridan, *Asylum seekers test positive for coronavirus*, VALLEY MORNING STAR, (Jun. 30, 2020), <https://www.valleymorningstar.com/2020/06/30/asylum-seekers-test-positive-coronavirus/>.

leisure because their return is considered essential.<sup>175</sup> While traveling may feel safe, asylum seekers and other migrants may have jobs that allow them time away from their crowded shelters.<sup>176</sup> A single encounter with an infected person could send a wave of infection through a migrant camp or shelter, or through a U.S. family. As human beings we must protect one another and ensuring adequate shelter with medical access for asylum seekers is an important step for the U.S. to take in doing so. Female asylum seekers deserve specific attention.

### ***Women***

The experiences of migrant women are unique during the COVID-19 pandemic. While male and female asylum seekers alike have rights to health care, women face different challenges simply because they are women. Reproduction is unique to women and their health, guaranteeing different needs and risks to women. Due to changes implemented by the Trump Administration, reproductive health of migrant women is at risk, causing them to be more susceptible to death during the global pandemic.<sup>177</sup> While sexual and reproductive health services provided for migrants within shelters and camps are already inadequate, the

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<sup>175</sup> U.S. Embassy & Consulates in Mexico, *Travel Restrictions- Fact Sheet*, (Jul. 20, 2020), <https://mx.usembassy.gov/travel-restrictions-fact-sheet/>.

<sup>176</sup> Mia Armstrong, *How Migrant Shelters in Mexico Are Facing COVID-19*, SLATE, (Apr. 13, 2020), <https://slate.com/technology/2020/04/coronavirus-migrant-shelters-mexico.html>.

<sup>177</sup> John Barsa, *ACTING ADMINISTRATOR JOHN BARS LETTER TO UN SECRETARY GENERAL GUTERRES*, USAID, (May 18, 2020), <https://www.usaid.gov/news-information/press-releases/may-18-2020-acting-administrator-john-barsa-un-secretary-general-antonio-guterres>.

implementation of the Migrant Protection Protocols decreases even further the chances of migrant women to obtain necessary services and survive COVID-19 if infected during the pandemic. This infringes on women's constitutional rights to life and liberty before denial of due process by the federal government under the Fifth Amendment, as well as their humanity.

On July 11, 2020 the United States Mission to the United Nations published a "Statement on the Humanitarian Affairs Segment of the Economic and Social Council" where they expressed disagreement with the UN Secretary General's Global Humanitarian Response Plan's guarantee of reproductive rights for women.<sup>178</sup> Instead, the U.S. Mission to the U.N. promises to continue working to "better promote women's health without also promoting abortion."<sup>179</sup> The U.S. Mission to the U.N. accuses the Secretary General of using the plan to "advance a policy agenda that does not enjoy Member State consensus, that is controversial, and which runs counter to U.S. policies."<sup>180</sup> Further they state that they "reject any interpretation of international human rights to require any State Party to provide access to abortion" and state that "there is no international right to abortion, nor is there any duty on the part of States to finance or facilitate abortion."<sup>181</sup> What the

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<sup>178</sup> United States Mission to the United Nations, *Statement on the Humanitarian Affairs Segment of the Economic and Social Council*, (June 11, 2020), <https://usun.usmission.gov/statement-on-the-humanitarian-affairs-segment-of-the-economic-and-social-council/>.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

U.S. Mission fails to acknowledge is that the plan never mentions abortion, and only focuses on the importance of sexual and reproductive health services, especially during a global pandemic, where pregnant women and children are considered most at risk.<sup>182</sup> According to Doctors Without Borders, the U.S. is “the largest funder of global health and humanitarian assistance” with the power to drastically alter the availability of reproductive health assistance to women in need.<sup>183</sup> While the U.S. is focused on preventing abortion, by refusing to provide reproductive health services to women, they are preventing access to much more. Sexual and reproductive health services encompass many invaluable, life-altering services “including prenatal check-ups, safe delivery care, neonatal care, sexual violence care, treatment for sexually transmitted infections, contraception, and safe abortion care.”<sup>184</sup>

According to the World Health Organization, research is currently underway regarding the susceptibility of pregnant women to contracting COVID-19.<sup>185</sup> There is no evidence suggesting that pregnant women are any more susceptible than the

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<sup>182</sup> United Nations, *Global Humanitarian Response Plan*, UNITED NATIONS OFFICE FOR THE COORDINATION OF HUMANITARIAN AFFAIRS, (Mar. 28, 2020), <https://www.unocha.org/sites/unocha/files/Global-Humanitarian-Response-Plan-COVID-19.pdf>.

<sup>183</sup> Avril Benoît, *Strong words and action needed to protect women’s lives during this pandemic*, DOCTORS WITHOUT BORDERS, (Jul. 2, 2020), <https://www.doctorswithoutborders.org/what-we-do/news-stories/news/strong-words-and-action-needed-protect-womens-lives-during-pandemic>.

<sup>184</sup> *Id.*

<sup>185</sup> World Health Organization, *Q&A: Pregnancy, childbirth, and COVID-19*, (Mar. 18, 2020), <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/question-and-answers-hub/q-a-detail/q-a-on-covid-19-pregnancy-and-childbirth>.

general population to severe illness brought on by COVID-19, however it is well known that women's bodies and immune systems are altered during pregnancy, making them more susceptible to certain respiratory infections.<sup>186</sup>

While maternal health is important to maintain during and after pregnancy, mothers also have the right to health for their newborns and children. Research up until now does not conclude that COVID-19 can be passed from a pregnant woman to her fetus or baby during pregnancy or childbirth, however, it can be transmitted from mother to infant, and new mothers infected with COVID-19 are encouraged to wear masks when holding and breastfeeding their babies.<sup>187</sup> Additionally, infants have undeveloped immune systems and airways, increasing their susceptibility to severe illness if infected with COVID-19.<sup>188</sup> It is unclear whether infected infants contracted the coronavirus before, during, or after childbirth, and when born by an infected mother, the CDC suggests temporary separation from their infant.<sup>189</sup> When separation is undesired or not possible, the CDC encourages that six feet of distance be maintained as often as possible, and that infants be kept within the

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<sup>186</sup> *Id.*

<sup>187</sup> World Health Organization, *Pregnancy, Childbirth, breastfeeding and COVID-19*, (last visited Aug. 8, 2020), <https://www.who.int/reproductivehealth/publications/emergencies/COVID-19-pregnancy-ipc-breastfeeding-infographics/en/>, World Health Organization, *Q&A: Pregnancy, childbirth, and COVID-19*, (Mar. 18, 2020), <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/question-and-answers-hub/q-a-detail/q-a-on-covid-19-pregnancy-and-childbirth>.

<sup>188</sup> Mayo Clinic Staff, *COVID-19 (coronavirus) in babies and children*, MAYO CLINIC, (Jul. 21, 2020), <https://www.mayoclinic.org/diseases-conditions/coronavirus/in-depth/coronavirus-in-babies-and-children/art-20484405>.

<sup>189</sup> Centers for Disease Control and Prevention, *Pregnancy & Breastfeeding: Protect yourself and your family from COVID-19*, (June 25, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/pregnancy-breastfeeding.html>.

physical barrier of an incubator.<sup>190</sup> While the CDC encourages new mothers and other caretakers to wear masks, they also stress the dangers of infants wearing facemasks or face shields, which can contribute to the risk of Sudden Infant Death Syndrome or accidental suffocation or strangulation.<sup>191</sup>

According to the Department of Homeland Security, “individuals from vulnerable populations may be excluded [from the Migrant Protection Protocols] on a case by case basis.<sup>192</sup> DHS does not elaborate on who is considered vulnerable, but the American Civil Liberties Union has implored them to include pregnant women who require specific care that they do not have access to in asylum camps and migrant shelters.<sup>193</sup> The DHS has instead began refusing entry to pregnant women who approach the U.S. border, even to attend their hearings.<sup>194</sup> This is an obvious effort to prevent children from being born in the U.S., who would then be U.S. citizens and could petition for citizenship on behalf of their parents. The Trump Administration does not appear to consider pregnant women to be vulnerable, despite apparent dangers posed to asylum seekers who have no

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<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> Department of Homeland Security, *Migrant Protection Protocols*, (Jan. 24, 2019), <https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols>.

<sup>193</sup> Physicians for Human Rights, “*Unsafe, Unsanitary, Inhumane*”: *PHR Medical Expert’s Observations at the Matamoros Migrant Encampment*, (Sept. 26, 2019), <https://phr.org/news/phr-statement-on-migrant-protection-protocols/>.

<sup>194</sup> Max Rivlin-Nadler, *Pregnant Asylum-Seekers Barred From U.S. Entry For Court Hearings*, NPR, (Feb. 23, 2020), <https://www.npr.org/2020/02/23/808536155/pregnant-asylum-seekers-barred-from-u-s-entry-for-court-hearings>.

access to prenatal care and potential dangers posed during the COVID-19 pandemic.<sup>195</sup> By refusing to focus on the health needs of pregnant women, refusing them entry, and returning them back to Mexico the U.S. government restricts the liberty of pregnant mothers to find adequate health care for themselves and their future child. Pregnant mothers are also forced to risk their lives and that of their future children when they experience pregnancy and childbirth in an asylum camp or migrant shelter. Women deserve humane treatment throughout their lives, and protections when vulnerable to disease due to pregnancy.

The connection of motherhood and the experience of childbirth bonds women across borders, among cultures, and between parties. Mothers deserve access to health care that ensures the health and safety of the innocent life they have brought into the world, regardless of legal status or constitutional rights. No newborn should suffer, and no mother should suffer the pain of watching an infant become infected and struggle to fight off COVID-19. All mothers are human and can recognize the importance of adequate health care for extremely vulnerable populations of women. Immigration restrictions must not exacerbate these issues.

### ***COVID-19 Restrictions on Asylum***

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<sup>195</sup> Physicians for Human Rights, “*Unsafe, Unsanitary, Inhumane*”: PHR Medical Expert’s Observations at the Matamoros Migrant Encampment, (Sept. 26, 2019), <https://phr.org/news/phr-statement-on-migrant-protection-protocols/>.

On March 24, 2020 the Centers for Disease Control and Protection promulgated a rule entitled, “Control of Communicable Diseases; Foreign Quarantine: Suspension of Introduction of Persons into United States From Designated Foreign Countries or Places for Public Health Purposes.”<sup>196</sup> The CDC order authorizes the removal of anyone arriving at the U.S. border from Mexico and Canada who lack legal status to enter, and provides no opportunity for noncitizens to apply for asylum or attend hearings for their asylum claims.<sup>197</sup> According to the CDC, the dangers of noncitizens being potential carriers of COVID-19 overrides any protection offered by immigration or asylum laws.<sup>198</sup> Asylum seekers will be turned away regardless of whether they show symptoms or appear to be contagious because of their exposure in “congregate settings.”<sup>199</sup> The CDC order does not ban any other entrants from Mexico and Canada who have documentation or legal status, but targets those who do not, such as asylum seekers because they often have no legal status or documentation until their claims are processed by Customs and Border Protection (CBP).<sup>200</sup>

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<sup>196</sup> 42 C.F.R. §71 (2020), <https://www.federalregister.gov/documents/2020/03/24/2020-06238/control-of-communicable-diseases-foreign-quarantine-suspension-of-introduction-of-persons-into>.

<sup>197</sup> Lucas Guttentag, *Coronavirus Border Expulsions: CDC’s Assault on Asylum Seekers and Unaccompanied Minors*, SLS, (Apr. 15, 2020), <https://law.stanford.edu/2020/04/15/coronavirus-border-expulsions-cdcs-assault-on-asylum-seekers-and-unaccompanied-minors/>.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*



By allowing CBP to remove noncitizens who present themselves at a U.S. port of entry within the U.S., without documentation, the Trump Administration violates asylum seekers' constitutional rights to life and liberty without providing them due process through the opportunity of a hearing. Under the CDC order, "the immediate suspension of the introduction of these aliens requires the movement of all such aliens to the country from which they entered the United States, or their country of origin, or another location as practicable, as rapidly as possible."<sup>201</sup> This indicates that asylum seekers from any country arriving in the U.S. from Mexico can be returned to Mexico, where they would then be subject to the dangers of homelessness in Mexico or potentially in asylum camps or migrant shelters that are allowing new arrivals amidst the pandemic. This abrupt removal is inhumane. The asylum seekers who are returned to Mexico will be subject to a lack of liberty when it comes to managing their health because they have no way to guarantee any form of health care to prevent or treat COVID-19. Additionally, they face potential deprivation of life if exposed to COVID-19, especially if they are unable to find shelter at a camp or migrant shelter where non-profit organizations or hired doctors are available. By refusing asylum seekers under the guise of protecting public health, the U.S. infringes upon constitutional rights granted by the federal

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<sup>201</sup> *Notice of Order Under Sections 362 and 365 of the Public Health Service Act Suspending Introduction of Certain Persons From Countries Where a Communicable Disease Exists*, 85 Fed. Reg. 17060 (Mar. 26, 2020), <https://www.federalregister.gov/documents/2020/03/26/2020-06327/notice-of-order-under-sections-362-and-365-of-the-public-health-service-act-suspending-introduction>.

government to any person within the U.S. by the Fifth Amendment, while simultaneously endangering the life and liberty the government sought to protect.

Closing the border to immigration applicants only while allowing the border to remain open to U.S. citizens returning from leisure travel to Mexico indicates the underlying anti-immigrant sentiment behind the policy.<sup>202</sup> It also displays disregard for the health, lives, and humanity of immigrants. If all migrants are considered dangerous, then any traveler could cause a significant amount of infection when crossing between the U.S. and Mexico. Additionally, it forces groups of vulnerable migrants to live in unsanitary conditions in Mexico, where U.S. citizens are still allowed to travel. The CDC order is not actually reflective of an effort to maintain public health and safety for U.S. citizens, let alone asylum seekers. A true effort would provide health care for any person in the U.S. including vaccine distribution.

### *Asylum seekers & Vaccines*

On May 8, 2020, the Secretary General of International Catholic Migration Commission, an international nonprofit organization that works to protect and aid migrants including asylum seekers, added his signature to a letter that expresses the

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<sup>202</sup> U.S. Embassy & Consulates in Mexico, *Travel Restrictions-Fact Sheet*, (July 20, 2020), <https://mx.usembassy.gov/travel-restrictions-fact-sheet/>.

importance of providing COVID-19 vaccines to the public.<sup>203</sup> The letter stresses the importance of widespread availability of the vaccine to vulnerable populations, including migrant populations, in hopes of preventing the vaccine from “becoming a costly privilege that can only be accessed by the already privileged members of society.”<sup>204</sup> As of June 30 2020, the CDC had yet to devise and publish a plan for vaccine distribution.<sup>205</sup> Washington Senator Patty Murray stressed the importance of recognizing and confronting “health disparities” that make health care unavailable to certain communities within the U.S.<sup>206</sup> According to Melinda Gates, the vaccine should first be distributed to the tens of millions of healthcare workers across the globe.<sup>207</sup> She suggests that black people and other communities of color should follow because of the disproportionate effects they are experiencing due to the virus.<sup>208</sup> Migrant populations are likely part of this second group facing disparate impacts during the pandemic. Following communities of color, Gates suggests people with underlying health conditions should be next, followed by the elderly.<sup>209</sup> Gates also stresses the importance of essential non-healthcare workers

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<sup>203</sup> International Catholic Migration Commission, *Mission*, (last visited Aug. 8, 2020), <https://www.icmc.net/who-we-are/>, International Catholic Migration Commission, *Vaccines Against COVID-19 Must Be Accessible to All*, (May 8, 2020), <https://www.icmc.net/2020/05/08/vaccines-against-covid-19-must-be-accessible-to-all/>.

<sup>204</sup> International Catholic Migration Commission, *Vaccines Against COVID-19 Must Be Accessible to All*, (May 8, 2020), <https://www.icmc.net/2020/05/08/vaccines-against-covid-19-must-be-accessible-to-all/>.

<sup>205</sup> Robert King, *Lawmakers press CDC for plan on distributing COVID-19 vaccine*, FIERCE HEALTHCARE, (June 30, 2020), <https://www.fiercehealthcare.com/payer/lawmakers-press-cdc-for-plan-distributing-covid-19-vaccine-combating-mistrust>.

<sup>206</sup> *Id.*

<sup>207</sup> Jamie Ducharme, *Melinda Gates Lays Out Her Biggest Concern for the Next Phase of the COVID-19 Pandemic*, TIME, (June 4, 2020), <https://time.com/5847483/melinda-gates-covid-19/>.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

having primary access to the vaccine.<sup>210</sup> Humanity calls for aiding vulnerable populations before privileged populations.

During the H1N1 pandemic which occurred in 2009, public health officials were vocal about the importance of vaccine availability to all immigrants, including those who were undocumented or in detention centers.<sup>211</sup> According to a then-CDC representative, Arleen Porcell, “Whether you’re legal or illegal, the flu virus doesn’t discriminate, and neither do we.”<sup>212</sup> The CDC has unfortunately not made any similar statement during the current pandemic, and recent practices in U.S. detention centers indicate that migrants may not be able to rely on the government for vaccines. In late 2019, CBP released a statement that they would no longer be vaccinating migrants in detention against seasonal influenza, despite children dying from complications of the virus in their custody.<sup>213</sup> A CBP spokeswoman claimed that complexities of providing vaccines prevents them from doing so.<sup>214</sup> Vaccine distribution by CBP is important because it recognizes the humanity of detained individuals.

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<sup>210</sup> *Id.*

<sup>211</sup> Erin Kelly, *Officials push Swine-flu shots for migrants*, THE ARIZONA REPUBLIC, (Sept. 26, 2009), <http://archive.azcentral.com/arizonarepublic/news/articles/2009/09/26/20090926flu-immig0926.html>.

<sup>212</sup> *Id.*

<sup>213</sup> Jessica Bursztynsky, *The US won’t provide flu vaccines to migrant families at border detention camps*, CNBC, (Aug. 20, 2019), <https://www.cnbc.com/2019/08/20/the-us-wont-vaccinate-migrant-children-against-the-flu-at-border-camps.html>.

<sup>214</sup> Jessica Bursztynsky, *The US won’t provide flu vaccines to migrant families at border detention camps*, CNBC, (Aug. 20, 2019), <https://www.cnbc.com/2019/08/20/the-us-wont-vaccinate-migrant-children-against-the-flu-at-border-camps.html>.

The U.S. is appropriately concerned with vaccine distribution to U.S. citizens; however, it is significant to U.S. citizens that asylum seekers receive the COVID-19 vaccine as well. Herd immunity is a concept that suggests vaccinating many people in one area lessens viral spread and prevents the infection of more people.<sup>215</sup> Due to the asylum process, asylum applicants come into the U.S. for their interviews where they encounter U.S. officials. When an applicant is approved and allowed asylee status and the ability to come fully into the U.S., they come in contact with many more people, whether it be other asylum seekers, homeless people, officers, or sponsors and their friends and families. Eventually, asylees will also encounter members of the public, when they interact with essential workers at stores, restaurants, and in healthcare settings. Asylum seekers, especially once approved, can increase the spread of COVID-19 if they happen to be carriers, by infecting U.S. citizens who have chosen not to vaccinate. According to the American Association for the Advancement of Science, only 50% of Americans are committed to COVID-19 vaccination.<sup>216</sup> The 50% unwilling to receive a vaccine will not be guaranteed any level of immunity to the virus, and by allowing asylees into the country without vaccination, the U.S. government implies

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<sup>215</sup> Stephanie Watson, *What's Herd Immunity, and How Does IT Protect Us?*, WEBMD, (Dec. 3, 2018), <https://www.webmd.com/vaccines/news/20181130/what-herd-immunity-and-how-does-it-protect-us>.

<sup>216</sup> Warren Cornwall, *Just 50% of Americans plan to get a COVID-19 vaccine. Here's how to win over the rest*, AAAS, (June 30, 2020), <https://www.sciencemag.org/news/2020/06/just-50-americans-plan-get-covid-19-vaccine-here-s-how-win-over-rest>.

that the lives of both asylees and citizens opposed to vaccination are theirs to risk. Widespread access to vaccination will benefit all of humanity.

Asylum seekers are a marginalized community to the point where they lack adequate health care, even during an international pandemic. The U.S. recognizes the importance of administering vaccines to migrants coming to the country, and in fact requires immigrants who apply for a visa or who seek permanent residency to be vaccinated for many viruses; mumps, measles, rubella, and polio, for example.<sup>217</sup> If a vaccine has not been administered prior to an immigrant's medical examination, the civil surgeon will administer it, indicating that USCIS is capable of administering vaccines to immigrant populations, despite excuses that state otherwise.<sup>218</sup> Because refugees and asylum seekers are not required to be vaccinated before their arrival in the U.S., the CDC created the Vaccination Program for U.S.- bound Refugees, which aids refugees and asylum seekers in vaccination in order to prevent the spread of disease amongst them and others with whom they come in contact.<sup>219</sup> This importantly indicates that some of the U.S. government recognizes the importance of providing vaccines to asylum seekers.

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<sup>217</sup> U.S. Citizenship and Immigration Services, *Vaccination Requirements*, DEPARTMENT OF HOMELAND SECURITY, (Jan. 10, 2020), <https://www.uscis.gov/tools/designated-civil-surgeons/vaccination-requirements#:~:text=Under%20the%20immigration%20laws%20of,Rubella>.

<sup>218</sup> U.S. Citizenship and Immigration Services, *Vaccination Requirements*, DEPARTMENT OF HOMELAND SECURITY, (Jan. 10, 2020), <https://www.uscis.gov/tools/designated-civil-surgeons/vaccination-requirements#:~:text=Under%20the%20immigration%20laws%20of,Rubella>.

<sup>219</sup> Centers for Disease Control and Prevention, *Vaccination for Refugees*, DEPARTMENT OF HOMELAND SECURITY, (Mar. 27, 2019), <https://www.cdc.gov/vaccines/adults/rec-vac/immigrants-refugees.html#vaccination-refugees>.

Asylum seekers' mandatory arrival in the U.S. in order to apply for asylum, suggests that asylum seekers have constitutional rights, including the Fifth and Fourteenth Amendment rights to life and liberty before due process of law.<sup>220</sup> Currently, the U.S. is responsible for sending back thousands of asylum seekers to Mexico where they live in camps or shelters that, due to crowding, are potential breeding grounds of COVID-19.<sup>221</sup> In violation of their right to life under the Fifth Amendment specifically, the U.S. government ignores the right asylum seekers have to the COVID-19 vaccine which would not only benefit asylum seekers, but also U.S. citizens who are privileged in their freedom to refuse vaccination. Additionally, the U.S. violates their right to liberty, by not offering them the option to receive a potentially life-saving vaccine, which all other persons of the U.S. will be allowed.<sup>222</sup> By providing vaccines to asylum seekers, the U.S. can honor asylum seekers' humanity.

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<sup>220</sup> U.S. Citizenship and Immigration Services, *The Affirmative Asylum Process*, DEPARTMENT OF HOMELAND SECURITY, (April 19, 2019), <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/the-affirmative-asylum-process>.

<sup>221</sup> Human rights first, *COVID-19 and the Remain in Mexico / "Migrant Protection Protocols" Policy*, (Apr. 14, 2020), <https://www.humanrightsfirst.org/resource/covid-19-and-remain-mexico-migrant-protection-protocols-policy>.

<sup>222</sup> Karen Weintraub, *A COVID-19 vaccine at what price? Should all Americans be able to get a shot for free?*, USA TODAY, (July 21, 2020), <https://www.usatoday.com/story/news/health/2020/07/21/should-government-funded-covid-19-vaccine-free-all-americans/5426531002/>.

## **Proposed Solution**

The Migrant Protection Protocols should be rescinded, rewritten, and republished immediately. The CDC order should also be immediately rescinded. The title of the Migrant Protection Protocols insinuates protection for migrants traveling to and filing claims for asylum in the U.S. when realistically, the Trump Administration attempts to protect American citizens from migrants who more often than not do not pose a threat to Americans.<sup>223</sup> Because of the particularities of COVID-19 and the precarious situation of migrants, migrant protection protocols are necessary, but they must adequately and accurately provide migrants with protection. There are multiple humanitarian measures through which to achieve these aims.

### ***Re-open Borders to Immigration; Prioritize Vulnerable Populations***

First, the Trump Administration must re-open U.S. borders to immigration applicants, including asylum seekers. By only halting immigration at our borders and not addressing the hundreds, if not thousands, of U.S. citizens driving across the borders who could also be potential carriers of COVID-19, the Trump Administration indicates that its motives are fueled by anti-immigrant biases, as opposed to a legitimate concern for U.S. citizen's lives amidst the COVID-19

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<sup>223</sup> Department of Homeland Security, *Migrant Protection Protocols*, (Jan. 24, 2019), <https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols>.



pandemic.<sup>224</sup> While it is necessary that we re-open our borders to immigrants, the U.S. government must do so in a manner that provides safety to migrants and immigration workers. This includes conducting immigration interviews remotely, or outside, physically distanced at six feet or more, while masks are being worn.

When it comes to evaluating immigration claims, asylum seekers must be first. Because asylum seekers face higher risk due to living in crowded camps and migrant shelters, they and refugees should be given priority over visa applicants, for example, who have a safe form of shelter in Mexico or another country that allows them to practice physical distancing. Asylum seekers are an extremely vulnerable population, especially considering current circumstances. They deserve priority, even more so because they are protected by the Fifth and Fourteenth Amendments of the U.S. constitution, whereas other immigration applicants are not. This also includes swift determination of applicant eligibility, and mandatory reconstruction of detention centers to prevent asylum seekers from facing a high risk of contracting COVID-19 while being held in U.S. detention centers.

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<sup>224</sup> U.S. Embassy & Consulates in Mexico, *Travel Restrictions- Fact Sheet*, (Jul. 20, 2020), <https://mx.usembassy.gov/travel-restrictions-fact-sheet/>.

## *Implement Modifications to Detention Centers*

Currently, asylum seekers are waiting in Mexico for months in dangerous conditions without receiving a response to their claims.<sup>225</sup> Instead, asylum seekers should be in an updated, safe detention center or at an alternate shelter where they can safely wait for a month maximum before receiving the determination of their claim. Without dramatic modification, U.S. detention centers are not safe places for asylum seekers. Detention centers are plagued with overcrowding, lack of cleaning and medical supplies, and failed isolation efforts when COVID-19 is detected.<sup>226</sup> To maintain low levels of detainees in detention, the U.S. must create more space where asylum seekers can safely stay the length of a month while awaiting the decisions of their claims and without contracting COVID-19. Hotels located near USCIS offices and in need of financial aid during the pandemic or large stadiums with room for hundreds could be used as alternate shelter and must not require an extremely vetted interview process but rather an extremely thorough COVID-19 screening. Detainees are deserving of standard shelter that maintains their health and safety, regardless of their personal backgrounds. If there is not already enough current immigration staff to dedicate to these efforts, positions in

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<sup>225</sup> Human Rights Watch, *Q&A: Trump Administration's "Remain in Mexico" Program*, (Jan. 29, 2020), <https://www.hrw.org/news/2020/01/29/qa-trump-administrations-remain-mexico-program>.

<sup>226</sup> Elliot Spagat, *How the coronavirus spread through one immigration facility*, AP News, (Jul 19, 2020), <https://apnews.com/c37254edd0acb3738fa4e916c3f249c6>.

construction and operation of adequate shelters should be opened to authorized U.S. workers.

Currently the U.S. DHS operates the Alternatives to Detention Program (ATD), which is funded by taxpayer dollars to monitor certain migrants while they are allowed a chance to live outside of detention.<sup>227</sup> In 2019, 184 million dollars were allocated to the program, and DHS is requesting twenty-five million dollars more in 2020 to expand the program to more participants.<sup>228</sup> With significant alterations, and a better management of funds, this program could function as a true alternative to detention that allows asylum seekers to exercise their constitutional rights while awaiting the determinations of their claims. Instead of focusing on supplementing detention and increasing surveillance, indicated by ankle bracelets, strict check-ins, and maltreatment by immigration officers, the ATD program should focus on humanitarian aid.<sup>229</sup> The twenty-five million dollars should be put toward providing case management, treating participants with respect and value, and creating communities of immigrants, where health and safety guidelines are implemented. Treating asylum seekers as humans instead of prisoners will greatly impact their ability to survive the COVID-19 pandemic.

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<sup>227</sup> National Immigrant Justice Center, *Report | A Better Way: Community-Based Programming As An Alternative To Immigrant Incarceration*, (Apr. 22, 2019), <https://immigrantjustice.org/research-items/report-better-way-community-based-programming-alternative-immigrant-incarceration>.

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

## *Provide Healthcare to Asylum Seekers*

Prior to the Trump Administration's Migrant Protection Protocols, asylum seekers would arrive at ports of entry and be granted certain admission into the country depending on different factors. For example, after a defensive asylum seeker passed a credible fear interview, they were permitted to wait in detention or sometimes with a sponsor within the U.S. until their hearing date.<sup>230</sup> Both of which are situations where they had access to some form of health care. Affirmative asylum seekers had similar opportunities.<sup>231</sup> To protect asylum seekers, the U.S. should reinstate this protocol while ensuring that they are provided with adequate shelter, food, water, and health care. This includes health care items necessitated by COVID-19, including but not limited to, for example, face masks, hand sanitizer, thermometers, ventilators, and testing. Instead of relying on the Mexican government and international non-profits to provide health care to asylum seekers, it is the responsibility of the U.S. to do so.

The U.S. pandemic response should include health care and vaccine distribution for asylum seekers. Field hospitals with at least one hundred beds for

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<sup>230</sup> Rocky Mountain Immigrant Advocacy Network, *Getting out of Detention: Options for People with Positive Credible Fear Determinations*, (last visited Aug. 8, 2020), [https://static1.squarespace.com/static/57f6bd842e69cf55d8158641/t/58c9e1c737c5813452ac02ef/1489625544976/RMIAN\\_Credible+Fear+Release+Options\\_Handout\\_English.pdf](https://static1.squarespace.com/static/57f6bd842e69cf55d8158641/t/58c9e1c737c5813452ac02ef/1489625544976/RMIAN_Credible+Fear+Release+Options_Handout_English.pdf), Asylum-Seekers Sponsorship Project, *More on sponsorship*, (last visited Aug. 10, 2020), <https://www.asylumsponsorshipproject.org/more-on-sponsorship.html>.

<sup>231</sup> U.S. Citizenship and Immigration Services, *The Affirmative Asylum Process*, DEPARTMENT OF HOMELAND SECURITY, (April 19, 2019), <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/the-affirmative-asylum-process>.

every one thousand asylum seekers should be available in the U.S., staffed by authorized U.S. workers including refugee and asylum applicant workers. Stadiums, warehouses, or makeshift tent clinics may provide space. Enough vaccines to be distributed to all asylum seekers who want one must be provided. The field hospitals should also be equipped with the supplies needed to provide the COVID-19 vaccine to asylum seekers such as syringes, needles, gloves, alcohol wipes, and band aids. Field hospitals should be staffed by U.S. workers and refugee and asylum applicant workers who undergo a short, yet intensive training to ensure adequate health care will be provided to preserve the lives of asylum seekers. This training must include direction for reproductive health services including the care of pregnant asylum seekers. Preventative care, Prenatal care, childbirth services, and postnatal care for mother and infant must all be offered. WHO guidelines regarding mask wearing or separation of COVID-19 positive mothers from their newborns must be imposed. The health and safety of all asylum seekers is paramount especially during the administration of due process.

For the fiscal year 2020, ICE requested close to seventy-eight million dollars for detention beds which includes the cost of healthcare for each bed's inhabitant.<sup>232</sup> This comes out to \$129.64 a day for each detainee, which pays not

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<sup>232</sup> U.S. Immigration and Customs Enforcement, *Budget Overview; Fiscal Year 2020*, DEPARTMENT OF HOMELAND SECURITY, 16, (2020), [https://www.dhs.gov/sites/default/files/publications/19\\_0318\\_MGMT\\_CBJ-Immigration-Customs-Enforcement\\_0.pdf](https://www.dhs.gov/sites/default/files/publications/19_0318_MGMT_CBJ-Immigration-Customs-Enforcement_0.pdf).

only for healthcare, but guards, facilities, and other program costs as well.<sup>233</sup> Seventy-eight million dollars for 54,000 detention beds could be allocated in ways that are geared more towards detainee health than towards detainee imprisonment.<sup>234</sup> The inadequacy of detention facilities is an obvious indicator that these taxpayer dollars are not as well spent as taxpayers would hope them to be.<sup>235</sup> Instead of using funds to, for example, pay for more guards, the funds should go towards providing proper health care to detainees which includes more healthcare workers, safe, sanitary living conditions, and fully stocked field hospitals.

ICE and DHS are given amounts of money great enough to achieve the articulated aims. It is time for immigration policy to stop treating migrants as prisoners and focus on migrants as people instead. This is not to say that U.S. citizens will be at a lack of resources, but rather all humans in need will have an adequate amount of resources that their health requires. Protecting U.S. citizens and protecting asylum seekers are not mutually exclusive events, but rather events that must complement one another. While there has been a shortage of necessary supplies since the beginning of the pandemic, this does not have to be the case if

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<sup>233</sup> *Id.* at 16.

<sup>234</sup> *Id.*

<sup>235</sup> Madeleine Joung, *What Is Happening at Migrant Detention Centers? Here's What to Know*, TIME, (July 12, 2019), <https://time.com/5623148/migrant-detention-centers-conditions/>.

our country decides to be active in the fight against COVID-19.<sup>236</sup> Federal funds should be used to create essential jobs that facilitate the construction of proper shelters as well as the making of necessary items such as ventilators and personal protective equipment. This solution offers work to U.S. citizens, discourages living off of our dwindling unemployment funds, and encourages citizens to actively participate in ending the pandemic. Instead of feeling as though they have been slighted, U.S. citizens can have some control knowing they are working and making a living wage, while contributing to increasing globalized access to important resources.

## **Conclusion**

The Migrant Protection Protocols and the CDC Health Order violate the Fifth Amendment rights to life and liberty before due process specifically, due to their federal nature. The rescission of both and the revision of the Migrant Protection Protocols are necessary to the U.S. providing health and safety to asylum seekers in congruence with their rights and their humanity. In recent years, federal immigration policy has been focused on dissension and animosity between cultures. For the safety of all people, U.S. citizens and non-citizens, especially during a global pandemic, the focus must shift to humanity- the commonality that

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<sup>236</sup> Megan L. Ranney, Valerie Griffeth, and Ashish K. Jha, *Critical Supply Shortages-The Need for Ventilators and Personal Protective Equipment during the Covid-19 Pandemic*, THE NEW ENGLAND JOURNAL OF MEDICINE, (Apr. 30, 2020), <https://www.nejm.org/doi/full/10.1056/NEJMp2006141>.

unites us. By rewriting the Migrant Protection Protocols to include (1) the prioritization of vulnerable migrants like asylum seekers in the immigration process, (2) health and safety standards in shelters and housing including detention centers, (3) mandated healthcare in field or regular hospitals for migrants including specialized care for women and COVID-19 patients, and (4) vaccine distribution to asylum seekers, the U.S. will respect the rights of all persons in the U.S., and actively contribute to mitigating the spread of COVID-19.